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REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

S. J. VANKOUGHNET,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. XLIV.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM, 42 VICTORIA, TO MICHAELMAS TERM, 43 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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J U D G E S
OF THE
COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

THE HON. JOHN HAWKINS HAGARTY, C. J.
" " JOHN DOUGLAS ARMOUR, J.
" " MATTHEW CROOKS CAMERON, J.

Attorney-General :
THE HON. OLIVER MOWAT.

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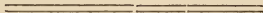
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REPORTS OF CASES
IN THE
COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 42 VICTORIA, 1878.

From November 18th to December 7th,

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

HIRAM G. FRANK v. BESWICK ET AL., EXECUTORS OF
SOLOMON FRANK.

*Partnership—Right to retire—Death of co-partner—Dissolution of
partnership.*

Plaintiff and two others entered into partnership under articles of agreement, dated January 9, 1877, providing that on the death of any one partner the business was to be closed until stock was taken and the affairs of the firm settled, when there was to be a division of profits; and that if any partner desired to withdraw after a year from the date of the articles he should give the other two members the right of refusal of his share of the business, &c.. There was a contemporaneous agreement as to what and how plaintiff was to pay for his share of the business; and then there was an instrument providing for the purchase by the other two partners of plaintiff's interest on certain conditions, with the alternative proviso, that if the plaintiff desired to withdraw from the firm he should be repaid all moneys put into the concern by him from the day of partnership up to January 1st, 1878; two months' notice of purchase or sale to be given on either side.

One of the two other partners died within six months from the date of the articles, and the plaintiff more than two months before the expiration of the year gave notice of his desire to retire and get back his money :

Held, that the effect of the death in the partnership within the year was to dissolve the firm, and that taking the three instruments together the plaintiff could only have obtained the benefit of the last agreement in case the firm continued to exist until after the close of the year; and therefore that his right of action was defeated by the dissolution, and his only remedy was an account in the ordinary way.

DECLARATION:

1. Common count, for money payable by defendants, as executors, for causes of action accrued against the deceased in his lifetime.

2. Common count, for money payable by defendants as executors, for causes of action accruing after the death of the testator.

3rd Count: On a promise by the testator to re-pay to the plaintiff all such money as the plaintiff should, up to January 1st, 1878, pay into and for the benefit of "Frank Brothers and Piper," alleging payment by plaintiff of \$1,907.54, and breach in testator's lifetime.

4th Count, same as the third count, but alleging breach after testator's death.

Pleas:

To 1st and 2nd counts, *nunquam indebitatus*.

To 3rd and 4th counts, *non assumpsit*.

Issue.

The cause was tried before Patterson, J.A., without a jury, at the last London Assizes, when it appeared that in 1876 the business of manufacturing "Wilson's Combined Sulky Harrow and Hay Rake," was being carried on at Strathroy, by the testator, Piper, and Scobie, each having a third interest in the patent right for the machine, but the testator and Scobie alone owning the stock, Piper having no interest in it. The testator and Piper were anxious to get Scobie out, and to get the plaintiff in. The plaintiff was unwilling to go in at first, but eventually agreed to do so, with the understanding that if he wished to withdraw he should get his money back after a year.

The proposed arrangement was carried into effect on or about the 9th of January, 1877, when the testator bought out Scobie's interest in the stock on hand, and his one-third interest in the patent right, paying him therefor respectively \$633.35 and \$500, which sums he at the same time received from the plaintiff for the transfer to him of the interests so acquired; and three instruments, each bearing the same date, January 9th, 1877, were there-

upon executed for carrying into effect the contemplated partnership.

One of these was entitled, "Articles of agreement for the sale and purchase of one-third interest of co-partnership," and was made between the testator and Piper, of the first part, and the plaintiff, of the second part, and recited that the parties of the first part had agreed to take into co-partnership the party of the second part, and to grant him all the rights, title and claim in and of such co-partnership, and all interest therein, to the extent of a one-third interest in such copartnership; and provided that the party of the second part should pay to the parties of the first part the sum of \$900, for one-third share in the interest of such co-partnership, as follows: \$500 on the execution thereof, and \$400 out of his one-third of the net profits of the firm, on the first day of January of each succeeding year, until the whole sum of \$400 had been paid. The \$500 mentioned in this instrument as to be paid upon the execution thereof, was the \$500 paid by the plaintiff to the testator, and by him paid to Scobie for his one-third interest in the patent right.

Another instrument was the articles of co-partnership between the testator, the plaintiff and Piper, whereby they agreed, so far as necessary to be stated, to become co-partners for the purpose of carrying on the manufacture of "Wilson's Combined Sulky Harrow and Hay Rake," in Strathroy, or elsewhere, if deemed necessary, by the firm conjointly, and also for the sale of territorial rights in the aforesaid patent, for five years, unless previously dissolved by mutual consent, under the name of Frank Brothers and Piper, with a working capital of \$600, of which each should pay down \$200, to be increased as necessity required, each party paying one-third, the profits and losses to be equally shared, each to give his time and attention to the business of the firm, or find a substitute; that at the death of a partner, the business should be closed until stock should be taken, and the affairs of the firm settled, and when so settled, one-third of the balance of net profits, if there should

be any balance after paying all debts and liabilities, should be paid to the heirs, legal representatives, executors, or assigns of the deceased : that if any partner should be desirous of withdrawing from the co-partnership after the close of one year from the date of the agreement, he should give the remaining firm of two members the first right of refusal to purchase his one-third share in the firm, and he should not sell his one-third share to any person or persons whom the other co-partners might disapprove of or object to receive as his substitute in the firm : that the deed of Wilson's patent, of which each member held one-third right, share and interest, belonged to no single partner, but was the common property of the firm : that the patent obtained by the testator, called "Frank's Improvement on Wilson's Combined Sulky Harrow and Hay Rake," should be used by the firm in the manufacture and sale of machines, under such patent ; and that all money arising from the sale of territorial rights in such patent should be applied for the joint benefit of the whole firm, each member having a third share in the net profits of both manufacture and sale of territorial rights, as long as he remained a member of the firm, but no longer.

The other instrument was that upon which this action was founded, and was made between the testator, the plaintiff, and Piper, and was in these words: "Whereas Solomon Frank and William Piper shall have the privilege to purchase the right, title, and one-third interest of Hiram G. Frank, in the co-partnership of the firm known by the name and title of Frank Brothers & Piper, upon the condition that they pay back to him all moneys he has paid into the firm from the day of partnership up to January 1st, 1878, with eight per cent. interest on the same ; or in the event that the said Hiram G. Frank desires to withdraw from such co-partnership, the said Solomon Frank and William Piper shall pay back to the said Hiram G. Frank all moneys paid into the firm from the day of partnership up to January 1st, 1878, without interest on the same, it being understood by both parties to this agree-

ment that there shall be two months' notice of purchase or sale on either side."

After the execution of these instruments the business of the co-partnership was entered upon by the firm, and continued by them until the death of the testator on June 8th, 1877; and as July was the season for selling the machines, and as there were a good many finished, and many nearly finished, it was deemed advisable that the surviving partners should go on and complete the machines, the defendants desiring them to do so. They accordingly went on and completed the machines, and sold some of them.

The plaintiff, after the testator's death, and more than two months before the 1st of January, 1878, gave notice to the defendants and to Piper that he wanted to retire and get back his money, and the plaintiff brought this suit to recover several sums of money as payable to him under the last mentioned instrument for work done, materials furnished, and money paid before the testator's death (including the \$633.35 above referred to,) to the amount of \$1636.28, and for money paid after the testator's death to the amount of \$506.95, in all \$2143.23, from which he deducted \$49.69 received by him before the testator's death, and \$186 received by him after the testator's death, in all \$235.69, leaving the balance claimed by him \$1907.54.

The learned Judge thought the plaintiff entitled to the balance claimed, if his notice given after the death of the testator was a withdrawing from the firm within the meaning of the agreement, but inclined to the opinion that it was not such a withdrawal, as the firm had ceased to exist, and that his appropriate proceeding was one for an account. He found that the business was not carried on after the testator's death, except for the purpose of completing and selling the machines on hand in order to wind up the business, and he entered a verdict for plaintiff for \$1907.54 and interest, \$2002.89 in all, leaving the defendant to move, and, if necessary, to move to amend in order wind up the estate.

21st November, 1878, *Marsh* obtained a rule *nisi* to set aside the verdict for the plaintiff, and enter a nonsuit, on the law and evidence; and also on the ground that the partnership had been dissolved by the death of Solomon Frank, and the plaintiff could not therefore avail himself of the provision for dissolution in the agreement mentioned; or to reduce the verdict.

6th December, 1878, *Meredith* shewed cause. The grounds are not sufficiently set out in the rule: *McDermott v. Ireson*, 38 U. C. R. 1; *Kennedy v. Freeth*, 23 U. C. R. 92. There was no dissolution of the partnership; but if there was, there was a sufficient withdrawal of plaintiff from it. The testator's death being the act of God, the Court will not allow it to affect the plaintiff injuriously: *Webb v. Rhodes*, 3 Bing. N. C. 732. The evidence shews that the intention of all parties was, that plaintiff should have his money back. He also referred to *Lindley* on Partnership, 4th ed., 22, 1028, 1029; *Bradbury v. Morgan*, 1 H. & C. 249.

John Cameron, contra, contended that there was a dissolution of the partnership, and the plaintiff could not retire before the year, which had not elapsed when the death took place which dissolved the firm.

28th December, 1878. ARMOUR, J.—The effect of the evidence, oral and documentary, clearly shews that so far as the agreement of the parties was concerned the plaintiff was to continue a partner for at least one year, and that he had no option of retiring from the co-partnership until after the close of that year, after giving the required notice.

The result of the death of the testator was to dissolve the co-partnership; and as it seems to us that the plaintiff could only have obtained the benefit of the agreement sued on provided the co-partnership continued to exist till after the close of the year, we are of opinion that the co-partnership having ceased to exist by reason of the death of the testator before the close of the year, the

plaintiff was thereby deprived of any benefit he might otherwise have derived from the said agreement, and that no action can be maintained by him thereon, or in respect thereof.

The rule will therefore be absolute to enter a nonsuit.

HAGARTY, C. J.—We must read the document on which the plaintiff rests his case in conjunction with the other papers executed on the same day.

By the agreement Solomon Frank and Piper take the plaintiff into partnership, giving him one-third interest. The articles provide for a five years' partnership, unless previously dissolved by consent; at the death of a partner the business to be closed till stock be taken and affairs settled, and profits to be divided; if any partner desire to withdraw after the close of one year from date, he shall give the other two members the right of refusal of his share, and not sell except to an approved person.

By a contemporaneous agreement plaintiff was to pay \$900 for his third share; \$500 cash, and the remaining \$400 out of his one-third of the net profits, to be paid on the 1st of January of each succeeding year until the total \$400 be paid.

Then, by the instrument of the same date, on which the action seems founded, the three agree: 1. That Solomon Frank and Piper shall have the privilege to purchase the right and one-third interest of plaintiff in the co-partnership, on condition that they pay back to him all moneys he has paid into the firm from the day of partnership up to January, 1878, with eight per cent. interest; or, in the event of the plaintiff desiring to withdraw therefrom, then Solomon Frank and Piper shall pay back to the plaintiff all moneys paid into the firm from the date of partnership to the 1st of January, 1878, without interest, two months' notice of purchase or sale to be given on either side.

On the 8th of June following Solomon died.

It appears to me that the effect of these writings is, that on Solomon's death within the year the partnership was

dissolved, and the account must be taken in the ordinary way—that this agreement, for the plaintiff retiring on certain terms at the end of the year, is defeated by the death of Solomon.

The agreement on this point was purely personal, and I think contingent on the three contracting parties being alive when the fulfilment was claimed.

I think there should be a nonsuit entered.

CAMERON, J., concurred.

Rule absolute to enter nonsuit.

RYERSE V. TEETER ET AL.

Ejectment—Statute of Limitations—R. S. O. ch. 108—Transfer of cause under sec. 34 of Administration of Justice Act (36 Vic. ch. 8, O.)—Practice.

A. W., a spinster, owner in fee, died in 1858, intestate, leaving two sisters of the whole blood, of whom the plaintiff was one, and a sister and three brothers of the half blood her surviving. The plaintiff A. L. R., on the death of A. W., entered and continued in sole possession till 1872, when by ejectment against her husband she was dispossessed by her sister, who obtained and continued in sole possession till the sale by her to the defendant in 1875, who remained in possession thereafter. A. L. R. in January, 1877, obtained conveyances to her from the brothers and sisters of the half blood, and filed a bill in Chancery claiming five-sixths of the land: *Held*, that the defendant was not entitled to tack to the possession of himself and his grantor that of A. L. R. prior to the ejectment, so as to bar the interests of the other tenants in common conveyed to the plaintiff:

Held, also, following *Dixon v. Gayfere*, 17 Beav. 421, that the defendant, not having by himself and his grantor the length of possession to constitute a bar, the plaintiff coming clothed with the rightful title to five-sixths was entitled to succeed, even though the owners of four of those shares, who conveyed to him, had been out of possession for more than ten years.

Observations as to the proper practice upon transfer of a cause under sec. 34 of the Administration of Justice Act, 1873.

The bill in this cause was filed on the 21st day of February, A.D., 1877, in the Court of Chancery, by the

plaintiff, claiming to be entitled to five undivided sixth parts of certain land in the township of Stamford, and admitting the defendant James Teeter to be entitled to one undivided sixth part thereof, and seeking partition or sale thereof.

The defendant James Teeter, by his answer, in effect denied the plaintiff to be entitled to five undivided sixth parts of said land, and claimed to be entitled to four undivided sixth parts thereof.

The cause was set down for the examination of witnesses and hearing before the Honourable the Chancellor of Ontario, at the sitting of the Court of Chancery held at the City of Toronto in the month of June, 1877, when the following facts appeared in evidence:—

Amelia Watkins died seised of the land in question in the year 1858, intestate, her father and mother both having died before her, leaving Jane Smith, the wife of one Samuel Smith, Augusta Louisa Ryerse, the plaintiff, the wife of Gildard Ryerse, one of the defendants, Thomas Watkins, John Joseph Watkins, Charles Watkins, and Emma G. Telfer, the wife of one William G. Telfer, her brothers and sisters, her heirs-at-law, her surviving, the four last named being her brothers and sister of the half blood.

Shortly after the death of Amelia Watkins the defendant Gildard Ryerse, and his wife, the plaintiff, entered into the actual possession of the land in question, and remained in such actual possession thereof for about two years, and thereupon the defendant Gildard Ryerse demised the said land from time to time to tenants, and received the rent thereof until some time in the end of 1873 or beginning of 1874.

On the 6th of September, 1872, the said Samuel Smith and Jane Smith commenced an action of ejectment for the said land against one William Parker, the tenant of the said Gildard Ryerse; and Gildard Ryerse having been substituted for the said William Parker as defendant, judgment was recovered in that action by the said Samuel

Smith and Jane Smith against the said Gildard Ryerse for one undivided half of the said land; and under a writ of possession issued upon that judgment, the sheriff put the said Samuel Smith and Jane Smith in possession of the whole, William Parker, the then tenant of Gildard Ryerse, becoming tenant to Samuel Smith and Jane Smith of the whole land.

Shortly after this Samuel Smith and Jane Smith, his wife, went into actual possession of the whole land, and remained in such actual possession thereof for about a year, when they leased it to one James Parker, and on the 27th of December, 1875, they conveyed it to the defendant James Teeter.

On the 17th of January, 1877, the said Charles Watkins conveyed the said land to the plaintiff, and on the 25th of January, 1877, the said John J. Watkins, Thomas Watkins, and Emma G. Telfer, conveyed the said land to the plaintiff, neither of them, the said Charles Watkins, John J. Watkins, Thomas Watkins and Emma G. Telfer, ever having been, since the death of the said Amelia Watkins, in possession of the said land, or of any part thereof, nor in the receipt of the rents and profits thereof, or of any part thereof; and although at the time of the passing of "The Real Property Limitation Act of 1874," the said John J. Watkins, Thomas Watkins, and Emma G. Telfer, resided in this Province, yet the said Charles Watkins then, and thereafter for twelve months continuously, resided without this Province.

The Chancellor, during the argument of the cause, expressed a strong opinion that the case properly belonged to and should be transferred to a Common Law Court.

The cause was thereupon transferred to this Court by the Court of Chancery, by an order of that Court bearing date the 5th day of June, 1877, purporting to have been made pursuant to the ninth and tenth sections of the Administration of Justice Act of 1873, but which could only have been made under the 32nd section of that Act.

The plaintiff's solicitors thereupon made up what

they called a record, containing a copy of the bill, answer, replication, the plaintiff's affidavit on production, the defendant James Teeter's affidavit on production, the plaintiff's notice to produce, the plaintiff's second notice to produce, the plaintiff's notice to admit, the defendant Teeter's notice to produce, the defendant Teeter's notice to admit, a proposed admission of facts, and three letters purporting to have passed between the solicitors for the plaintiff and the solicitors for the defendant Teeter; and having endorsed it as a record of this Court, procured it to be marked as having been examined and passed, and caused it be entered at the last fall assizes for the City of Toronto, and thereat procured the learned Chief Justice of the Common Pleas, presiding, at the said assizes, to endorse a verdict thereon for the plaintiff, on the statement that such a verdict had been consented to.

20th November, 1877. *A. Hoskin* obtained a rule *nisi* to set aside the verdict and for a new trial, or to enter the verdict for defendant James Teeter on the law and evidence.

26th November, 1878. *A. Hoskin* supported his rule, no one appearing to shew cause. The verdict should be for defendant for two-thirds of the land, and for plaintiff for one-third; *Dixon v. Gayfere*, 17 Beav. 421.

28th December, 1878. ARMOUR, J.—The only question argued before this Court was, as to the number of shares in the said land to which the plaintiff and the defendant James Teeter were respectively entitled under the facts above set forth.

The plaintiff is doubtless entitled to one undivided sixth part of the said land in her own right, as one of the heirs at law of Amelia Watkins. She is also entitled to another one undivided sixth part of the said land, as the grantee of Charles Watkins, who was entitled thereto as one of the heirs-at-law of Amelia Watkins, and whose title thereto had not been up to the time of the filing of the bill in

this cause extinguished by The Real Property Limitation Act of 1874, because that Act would not have come into force respecting him until the first day of July, 1877, he having at the time of the passing thereof, and for twelve months continuously thereafter, resided without this Province.

The defendant James Teeter is also clearly entitled to one undivided sixth part of the said land, as grantee of Jane Smith, the wife of Samuel Smith, and one of the heirs-at-law of Amelia Watkins.

But the difficult question arises as to the other three undivided sixth parts, who is to be declared entitled to them. If the Real Property Limitation Act, R. S. O. cap. 108, applies to a case like the present, the title of John J. Watkins, Thomas Watkins, and Emma G. Telfer, to their shares in the land in question, as heirs-at-law of Amelia Watkins, was extinguished before they conveyed to the plaintiff.

In a case of *Dixon v. Gayfere*, 17 Beav. 421, precisely the same question was presented as in this case, and in that case the Master of the Rolls held that the Statute of Limitations, 3 & 4, Will. IV., ch. 42, similar in its provisions to The Real Property Limitation Act, did not apply, and declared the heir of the true owner entitled. He states that case as follows: "Here is a property, the legal estate in which is outstanding in a trustee. The equitable owner of it dies intestate in 1818. A person having no title enters into possession of it, and receives the rents and profits thereof for eighteen years and a half. On his death another person having as little title as himself enters into possession and receives the rents for a year and a half more. After this, for four years, the tenants refuse to pay their rents to any one. They alone are in possession, and at length, after the lapse of twenty-four years from the death of the equitable owner, the trustee files a bill claiming no interest therein himself, but praying this Court to ascertain and declare who are the persons entitled to this property," His Honour proceeds to say: "If a series of trespassers, each adverse to one another, and to the rightful owner, take and

keep possession of an estate in succession for various periods of time, each less than, but exceeding in the whole twenty years, in whose favour (if the Court has possession of the estate, as in this case it has,) is the right to be declared? Is it to be in favour of the trespasser who has held the estate for the longest period? Is it to be in favour of the first of them? Or is it to be in favour of the last of them? The objection to each and every one of them obtaining such a declaration appears to me to be insuperable." And he concludes, "I am of opinion, therefore, that in the circumstances of this case (which are very peculiar) the Statute of Limitations having conferred no right does not apply; and this Court must ascertain and declare the rights of the parties exactly in the same manner as if that statute did not exist."

Following this case, I think we must declare that the plaintiff is entitled to the three undivided sixth parts of the said land, to which John J. Watkins, Thomas Watkins and Emma G. Telfer, were entitled as heirs-at-law of Amelia Watkins, and which they conveyed to the plaintiff,

The decree will therefore be for a sale of the land in question, that the costs to be taxed as between party and party be paid out of the proceeds of such sale, and that the residue of such proceeds shall be paid—five-sixths thereof to the plaintiff, and one-sixth thereof to the defendant James Teeter.

Sec. 34 of the Administration of Justice Act of 1873, provides that upon the transfer of a cause "no further or other pleadings shall be necessary than the original pleadings in the Court from which such suit, action, or proceeding was transferred, unless specially ordered by the Court or Judge." Upon the transfer of this cause what ought to have been done was to have set this cause down on the paper for argument in the same manner as a special case, or a verdict subject to the opinion of the Court.

No costs will therefore be taxed to either party, except such as would have been necessarily incurred had this course been adopted.

HAGARTY, C. J.—The case of *Dixon v. Gayfere*, cited by my brother Armour, does not appear to have been overruled. A remark of Cockburn, C. J., in *Asher v. Whitlock*, L. R. 1 Q. B. 1, is noticed by subsequent writers, but it merely amounts to suggesting that such a decision might not be arrived at at law.

It must be noted that the decision at the Rolls is wholly misquoted in its facts when the above remark was elicited from the Chief Justice.

This is an equity suit transferred to us. I presume we are to follow Lord Romilly's view. But another view seems worthy of consideration.

This defendant never entered into possession till 1874, and neither in him, or any one through whom he claims, has any title by any Statute of Limitations accrued. He now urges that as regards the owners of the three-sixths, who conveyed to plaintiff in 1877, they are barred by the Statute of Limitations of Ontario, having been out of possession for over ten years, or, in the words of the Act, "while entitled thereto, been dispossessed, or has discontinued such possession."

The defendant was never in actual possession till 1874. The plaintiff had been in actual possession by herself, or her tenants, from 1858 to 1873, nearly fifteen years, till dispossessed by defendant, when, as I understand it, the plaintiff's tenant attorned to defendant.

Defendant entered rightfully as regarded his one-sixth, and plaintiff's dispossession was, that in fact defendant got into actual holding of the whole estate.

Now the defendant, admitting plaintiff's right to her own interest, urges that three of the other joint tenants, or tenants in common, could convey nothing to her, as their interests were barred. The bar, if any, could only be created by plaintiff's own possession preceding defendant's possession and making up the required ten years.

It has been declared repeatedly, from *Doe Taylor v. Proudfoot*, 9 U.C.R. 503, to *Lloyd v. Henderson*, 25 C.P. 253, and cases there cited, that under the statute there must be

not only a discontinuance of possession by the owner or claimant, but also possession by another.

I think we should pause long before acceding to defendant's claim to use plaintiff's possession as a bar to the rights of the other joint owners who convey to the plaintiff, and so far as in them lies clothe her with whatever rights they had. I think it would be contrary to the spirit of the Statutes of Limitations to give them for the first time such an interpretation.

Defendant does not shew that the plaintiff's possession, during the many years it lasted, may not have been in fact on the terms of accounting to these three tenants in common for their share of the rents and profits. He merely proves by a witness that they were not ever in apparent possession. It may be that by this latter evidence he throws on them to shew a receipt of rents and profits.

I am at present unable to see his right to tack plaintiff's possession to his three years' possession, to create a statutable bar to defeat a good paper title of the plaintiff. His ouster of plaintiff in 1874 was really a tort to her existing interest.

The Statute of Limitations clearly prevents the joint tenant, or tenant in common, from urging that the possession of his co-tenant is his possession, and after the prescribed time has elapsed he is equally barred as by the possession of a stranger. This is well illustrated by *Burrows v. McCreight*, 1 J. & Lat. 303, before Sugden, L. C.; *Lord St. Leonards' Real Property Statutes*, 66; *Darby & Bos. on Limitations*, 284; and this, even where the legal estate was in a trustee who had never intervened, but allowed four *cestuis que trustent* to bar the right of the fifth.

But I am unable to understand how, under the circumstances before us, this defendant can, in any way, use the possession of the claimant as a bar to any estate got in or acquired by such claimant, to enlarge or fortify her own estate.

We will suppose that A. has been in peaceable possession nine years and six months, and is then dispossessed by B., and eight months after this A. buys a perfect paper title. I hardly think that this title can be defeated by urging that his vendor was barred by being over ten years dispossessed, the alleged dispossession being nearly all the time by his vendee. Of course A. might have recovered the land against a *tortfeasor* on his mere possession, when disturbed; but I cannot see why he does not at once become clothed with the full paper title of his vendor.

CAMERON, J., took no part in the judgment, having been concerned in the case at the bar.

Judgment accordingly.

REGINA V. RAY.

Criminal law—Conviction—Mandamus to enforce.

The Court refused a mandamus to the mayor of a municipality to issue a distress warrant on a conviction made by him, under the Temperance Act of 1864, where the by-law and conviction were open to grave objections, which had been taken on the trial before him.

November 19, 1878. *Johnstone*, for the Crown, obtained a rule *nisi*, calling upon James Holden, Esquire, Mayor of the town of Whitby, to shew cause why a writ of mandamus should not issue, directing him to sign and issue, under his hand and seal, as Mayor of the town of Whitby, a proper distress warrant against the goods and chattels of Samuel Rae, of said town of Whitby, keeper of a house of public entertainment, on a certain conviction made against him by the said Mayor, on the 1st of June, 1878, for selling intoxicating liquors contrary to the Temperance Act of 1864, in order to levy the \$25 and costs adjudged by such conviction against the said Rae.

The information upon which the conviction in question was founded, had been laid before the said Mayor of Whitby, on the 20th May, 1878, and charged the defendant with having, on the 17th day of May, and at sundry times before or thereafter, exposed and kept for sale certain spirituous or other intoxicating liquors, contrary to section 12 of the Temperance Act of 1864, then and there being fully in force, and with having sold the same.

The charge was afterwards heard on the 1st June following, when the defendant was fined \$25 and costs.

Affidavits were filed, on behalf of the Crown, shewing that application had been made to the said Mayor, and to other Justices of the Peace, for a distress warrant to levy the amount of the penalty and costs, but that no warrant could be obtained.

It also appeared from the affidavits and papers filed, that the counsel for the defendant had, at the trial before the said Mayor, contended that the Temperance Act of

1864 was not in force in the town of Whitby, and that sections 6 and 7 had not been complied with: that the by-law passed under the Act was not signed by the clerk of the corporation of the county of Ontario, as required by the 281st section of the Municipal Act, (R. S. O. ch. 174); and that the Mayor's only reason for not issuing the distress warrant was, that in his opinion the by-law was bad, and that he would subject himself to an action for damages, if he issued the same.

From the evidence taken before the Mayor, it appeared that no copy of the by-law had been delivered to the clerk of the town of Whitby, as required by section 7.

The copy of the by-law put in was certified in accordance with the Act, but from it it appeared the original had not been signed by the clerk of the County Council.

November 28, 1878. *Ferguson*, Q. C., shewed cause. The question is a doubtful one, and a mandamus will therefore not be granted: *Regina v. McConnell*, 6 O. S. 629. The Court will not expose the magistrate to any risk. The conviction is also bad, and should be quashed. The by-law in question was passed under section 226 of the Municipal Act of 1873, and it was not communicated to the clerk of the municipality, which was a condition precedent to its coming into force. The conviction is bad on its face, for it convicts of selling on the 17th May, and on divers days before and subsequently. Under the Dunkin Act the magistrate has a discretion as to the issue of a warrant, and that being so, a mandamus will not be granted. *High*, on Extraordinary Remedies, sec. 33, states that the applicant for the writ must shew his interest, and it is not sufficient merely to shew a conviction.

Johnstone, contra. Under the Act of 1864, the warrant should have been at once issued, and under that Act the Mayor cannot dispute the fact of the Act being in force. He referred to *Morgan v. Parry*, 17 C. B. 334; *Re Lake & Blakely*, 40 U. C. R., 102.

Ferguson, Q.C., in reply, cited *Tapping* on Mandamus,

290, 291; *Rex v. Dyer*, 2 A. & E. 606; *Rex v. Mirehouse*, 2 A. & E. 632; *Rex v. Greame*, 2 A. & E. 615; *Rex v. Halls*, 3 A. & E. 494.

December 28, 1878. HAGARTY, C. J.—We have examined the papers on this application, and have come to the conclusion that, as the matter necessarily must rest in the discretion of the Court, we ought not to make the order asked.

It is to compel the Mayor of the town of Whitby to issue a distress warrant on a conviction made by him. He objects to do so, declaring that he thinks it illegal to proceed in the matter.

At the hearing before him it was objected that the Temperance By-law passed by the county of Ontario, had never been communicated officially, either to the collector of inland revenue, or to the town clerk of Whitby.

Section 6 of the Act of 1864 declared that the by-law should be communicated by delivery of a copy, certified by the clerk or secretary-treasurer, to the collector of inland revenue, with certain endorsements.

Section 7 directs. "Every such county by-law shall also, at the same time, be communicated by the like delivery to the clerk, or secretary-treasurer of each municipality in the county, who shall file and keep same among the records of the municipal council thereof."

In *re Lake & Blakely*, 40 U. C. 102, the first objection was held to be cured by certain Ontario legislation.

It was clearly proved that the by-law had never been communicated to the town of Whitby municipality, and was not among their records. This was a singular omission by the promoters of this county by-law, or by the county authorities. There would thus be nothing on record in the town municipality to shew the new by-law.

It was further objected that the by-law had not been signed by the county clerk. Several objections were taken to the conviction of a very serious character.

We are not called on on this application to discuss the va-

lidity of these objections as if on an application to quash a by-law, or in an action or proceeding involving their validity.

We think it sufficient to hold that we ought not to order the Mayor to proceed, by issuing a writ of mandamus. The parties seeking to enforce this law, and asking us to interfere by this extraordinary remedy, might, we think, have taken care to have had the proceedings less open to so many objections.

We must not be understood as holding that the by-law is not in force.

We decline ordering the Mayor to sign a warrant on a conviction open to grave objections, and therefore discharge the rule, making no order as to costs.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

LESLIE ET AL. V. CANADA CENTRAL RAILWAY COMPANY.

Railways and railway companies—Wrongful delivery of goods—Trover—Measure of damages.

The plaintiffs, nursery-men in Toronto, sent by the Grand Trunk R. W. Co. 14 packages of trees, addressed to their own order, to Cobden, a station on defendants' line of railway, receiving the usual shipping note issued by the Grand Trunk Company. The goods were delivered by that company to defendants in the ordinary course, and carried to Cobden. They were intended for one S. there, who had agreed to purchase them from the plaintiffs, but the plaintiffs required payment from him before delivery. Several telegrams passed between S., the station master and the plaintiffs; and the station master, being authorized by the plaintiffs to deliver only half of the packages to S., allowed him to take all, receiving from him the entire freight from Toronto: *Held*, that the defendants were liable in trover for the packages thus wrongfully delivered, and that it made no difference that the contract to carry was with the Grand Trunk Company only.

It was insisted by the plaintiffs that S. was to pay them \$1,000, including a former claim, before obtaining these trees, and that they had lost the same by defendants' wrongful delivery, but

Held, that, upon the evidence stated below, there was no ground for giving more than the value of the trees wrongfully delivered and interest—the ordinary measure of damages.

The declaration contained two counts. 1. That the defendants, as carriers, received from the plaintiffs certain goods, namely, fourteen boxes of trees, to be carried to the village of Cobden, and there to be delivered to the plaintiffs for reward to the defendants in that behalf; and that all things happened necessary to entitle the plaintiffs to have said goods so delivered to them at Cobden, yet the defendants did not so deliver. 2. Trover.

Pleas: 1. Not guilty.

2. That, as to the first count, the plaintiffs did not deliver to the defendants, nor did they receive from the plaintiffs the said goods in said count mentioned, or any of them, for the purpose and on the terms therein alleged.

3. That they carried the said goods to Cobden, and there delivered the same to the plaintiffs within a reasonable time.

4. That, as to the second count, the said goods were not the plaintiffs'.

5. That the plaintiffs' claim was satisfied by one George Simpson paying the plaintiffs, at the defendants' request, out of the moneys of the said Simpson, a sum which, by agreement between the said Simpson, plaintiffs and defendants, the said Simpson paid and the plaintiffs accepted in satisfaction of the said claim.

Issue.

The case was tried at the last Toronto Fall Assizes, before Patterson, J. A., without a jury.

The following facts appeared :

The plaintiffs were nurserymen near Toronto, and on the 10th of October, 1877, sent by the Grand Trunk Railway thirteen boxes and one bale of trees, addressed to their own order at a place called Cobden, a station on the defendants' line of railway. The usual shipping bill or note was issued by the Grand Trunk Company, and was as follows :—

“TORONTO, October 10th, 1877.

“Received from George Leslie & Son the undermentioned property, in apparent good order, addressed to George Leslie & Son, Cobden, to be sent by the said company, subject to the terms and conditions stated above, and upon the other side, and agreed to by the shipping note delivered to the company at the time of giving this receipt therefor.

“*Vid* Prescott.

13 boxes and 1 bale trees, marked G. L. & S., C.

2 “ marked E on end.

7 “ “ C “

2 “ “ B “

2 “ } “ P “

1 bale }

“Freight guaranteed.

“1 box plants.

(Signed)

“ROBERT B. MOODIE,

“*Agent G. T. R.*”

The plaintiffs had dealings with persons named Simpson, who sold trees in their part of the country, obtained at wholesale from the plaintiffs. These boxes appeared to have been delivered by the Grand Trunk Company to defendants' company in the ordinary course.

The plaintiffs required Simpson to deposit or remit certain moneys before delivering the trees to him.

On the 15th of October, the plaintiffs telegraphed the station master at Cobden station, "Deliver Geo. Simpson seven boxes, addressed G. L. & S., marked C. on the end."

Next day Simpson telegraphed to the plaintiffs that the car was to be at Cobden next night, and "do we have Cobden delivery first? Answer."

On October, 17th, the plaintiffs answered "Yes, we telegraphed station master Monday to deliver seven boxes, marked C. on end."

On October 19th, Simpson telegraphed, "Trees to hand yesterday, delivering well, will remit Monday."

On October 22nd, the plaintiffs telegraphed to Simpson, "Did you deposit to-day? Answer at once."

On the same day Simpson telegraphed to the plaintiffs, "You have a deposit of \$370 at Merchants' Bank to-day, more soon."

On October the 24th, plaintiffs telegraphed to Simpson, "Surprised at smallness of deposit; what is the matter? Answer quick."

On the same day the plaintiffs telegraphed to station master, Cobden, "How many boxes trees have you delivered to Simpson? Please answer quick."

On October 25th, the plaintiffs telegraphed to Simpson, "Have you made second deposit yet? Please answer quick."

On the same day, the plaintiffs telegraphed to station master, Cobden, "Please let us know how many boxes trees have been delivered to Geo. Simpson?"

On October 26th, the plaintiffs telegraphed to Simpson, "Answer messages at once."

On the same day Simpson telegraphed to plaintiffs from Renfrew, "Will deposit Monday morning."

On the 27th of October, the plaintiffs telegraphed to station master, "Telegraphed you twice, received no answer. If you exceeded telegraphic instructions 15th inst., we hold your company responsible for loss, if any."

On October 27th, the plaintiffs telegraphed to Simpson, "Your note, due Monday next, provide for it. Why are you at Pembroke?"

On October 29th, Simpson telegraphed to plaintiffs, "Deposit made in Merchants' Bank to-day."

On November 1st, Robert Allen, defendants' station master at Cobden, telegraphed to plaintiffs, "Delivered trees to Simpson. You wired me to deliver part. Against orders to break bulk on a car load."

On the 3rd of November, the plaintiffs wrote to the station master, that they would hold defendants liable for loss, if any.

It was strongly urged by defendants that the plaintiffs could not recover from them, as the dealing was wholly with the Grand Trunk Company, and that neither for negligence nor in trover would the action lie.

The learned Judge entered a verdict for defendants, with leave to the plaintiffs to move to enter a verdict for them for \$500, if the Court should think the plaintiffs could recover.

November 20, 1878. *Reeve* obtained a rule *nisi* accordingly.

December 5, 1878. *McCarthy*, Q.C., shewed cause, citing *Stephenson v. Hart*, 4 Bing. 476; *Muschamp v. Lancashire and Preston, &c.*, R. W. Co., 8 M. & W. 421; *Hiort v. Bott*, L. R. 9 Ex. 86, 90; *Sydes v. Hay*, 4 T. R. 260, 464; *Heugh v. London & N. W. R. Co.*, L. R. 5 Ex. 51.

Reeve, contra, cited *Martin v. Great Indian Peninsular R. W. Co.*, L. R. 3 Ex. 9; *McKean v. McIvor*, L. R. 6 Ex. 36.

December 28, 1878. HAGARTY, C. J.—The defendants received these goods from the Grand Trunk Company to be delivered at Cobden on their line to the plaintiffs' order, and when Simpson got the property defendants received from him the entire freight from Toronto, including the Grand Trunk charges and their own. This seems a very common business transaction, and we should have thought

that the defendants' liability for any wrongful dealing with the property against the rights or dominion over it of those of whose ownership they had express notice, was beyond question.

The goods lay at Cobden station on the plaintiffs' order, liable to back charges for freight. An unauthorized delivery without such order, or against such order, would, we think, be evidence of a conversion. They are promptly notified by telegraph to deliver seven out of the fourteen parcels to Simpson. On this they deliver the whole to him, and the plaintiffs' possession and control thereof are wholly lost to them.

It seems to us that if the disposition made by the defendants was to any other person than the persons whom alone they could recognize as owners, and with full notice of the true ownership they place the goods in the hands of such other, they must be liable to the plaintiffs as fully as the Grand Trunk Company would have been if Cobden had been a station on the line of the latter company.

As Bramwell, B., says, in *Martin v. Great Indian Peninsular R. W. Co.*, L. R. 3 Ex. 14, "The plaintiff says, 'You had my goods in your possession, and you delivered them wrongly, no matter whether wilfully or negligently; either way you did wrong.' The defendants reply, 'I bargained with some one else to carry them.' But how does this furnish an answer? The contract is no concern of the plaintiff's; the act was none the less a wrong to him."

Heald v. Carey, 11 C. B. 977, is a very well argued case. There the defendant escaped liability; but it seems clear, we think, that had he done anything in the way of delivering the goods, as was done here, with notice of the plaintiffs' ownership, he would assuredly have been held liable.

Hiort v. Bott, L. R. 9 Ex. 90, cited by Mr. McCarthy for the defendants, seems to us to lay down principles wholly in favour of the plaintiffs.

Heugh v. London and North-Western R. W. Co., L. R. 5 Ex. 51, is very distinguishable, as the carriers had ceased

to act as such, the consignee refusing to accept, and the goods remaining with them as involuntary bailees.

The law seems to be that where any person holding property as carrier, wharfinger, warehouseman, &c., which he knows to belong to one person, and to be subject to his order, voluntarily gives that property to another without the owner's assent, so that the latter is thereby deprived of his dominion over it, it is evidence of a conversion to support an action of trover.

The delivery to Simpson of the whole quantity at Cobden was admitted to have been in consequence of some neglect in dealing with the plaintiffs' telegram of 15th October, and the station master thought they had orders to deliver all.

There was contradictory evidence as to the terms on which Simpson was to get the trees. The plaintiffs admit that the actual price of the whole consignment was \$561. For this sum they would furnish them at Toronto. The entire freight, \$65, to Cobden was paid by Simpson to the defendants, but it appears the money therefor came from the plaintiffs.

But the plaintiffs insist that the arrangement with Simpson was that before he obtained delivery of these trees he was to pay to the plaintiffs \$1,000 or \$1,100, including a former claim of the plaintiffs against him, and that they have lost this large amount by the defendants' default.

Simpson denies this, and swears he paid enough in cash, sent or deposited in the Merchants' Bank, to pay for this consignment to about \$626.

We can hardly see in the case, as reported to us, how to determine on which side the truth lies as to the alleged arrangement, nor how we can decide the case except on the ordinary ground of the market value of the property of which the plaintiffs were deprived. The defendants at the trial abandoned the plea of satisfaction.

As a mere ordinary case of conversion of goods, the figures would stand thus—

Market value of goods sent from Toronto...	\$561 62
Freight paid by plaintiffs	65 00
	<hr/>
	\$626 62

The plaintiffs directed delivery of half the goods, so that the wrong is confined to the other half. This half the plaintiffs admit to be about half the whole value.

\$626 62

½) \$313 31

No bad faith or intentional wrong being imputed, but a mere mistake being made, and the market price undisputed, the usual amount of damages should be confined thereto.

We cannot see our way to giving the plaintiffs any special damages apart from the value of their property. No special damage is claimed, even if recoverable. The subject is discussed, and the authorities, in *Mayne on Damages*, 3rd ed., page 349.

Acting as Judges both of the law and facts in evidence we think the proper sum to be awarded to the plaintiffs is \$313.31, with interest as further damages from the date of the wrongful conversion.

Rule absolute to enter a verdict for the plaintiffs on the count in trover for the \$313.31, and interest.

Rule accordingly.

MEMORANDA.

During Michaelmas Term the following gentlemen were called to the Bar :—

FREDERICK PIMLOTT BETTS, WILLIAM BARTON NORTHRUP, JAMES ALBERT MANNING AIKINS, EDMUND LINDSAY DICKINSON, ALBERT JEFFREY, WALTER MACDONALD, DUNCAN DENIS RIORDAN, WILLIAM HENRY BEST, THOMAS ROLLO SLAGHT, BARTLE EDWARD BULL, JOHN BALL DOW, ROBERT HODGE.

SITTINGS IN VACATION

AFTER MICHAELMAS TERM, 1878.

PARKINSON V. THOMPSON.

Costs of the day—Appeal from clerk of crown and pleas—R. S. O. ch. 39, sec. 31.

Plaintiff being ready to proceed with the trial of his case at the Assizes, defendant's counsel applied for a postponement, stating that defendant and his witnesses had not arrived, to which the plaintiff did not object, though anxious to have the case disposed of. On the following day, when the cause was again called on, the plaintiff was not ready, owing to the absence of a witness, who had been there the day before, but the Judge insisted upon the cause proceeding, whereupon the plaintiff, in order to avoid a nonsuit, withdrew the record:

Held, that defendant was entitled to the costs of the day, and an order made by the Clerk of the Crown and Pleas, setting aside a sidebar rule therefor, was accordingly rescinded.

Held, also, that the single Court was not precluded from disposing of an application to rescind such order, on the ground that no application for the purpose had been made to a Judge in Chambers within four days after the making of the order under the rule of Court of Hilary term, 1870, the exception contained in section 31 of ch. 39, R. S. O., merely providing an additional or more speedy mode of appeal, and not taking away the right of resort to the Court for the purpose.

On the 21st November, 1878, *F. Osler*, for defendant, obtained from Armour, J., sitting alone, a rule *nisi* to shew cause why the order of the Clerk of the Crown and Pleas of the Court of Queen's Bench in Chambers, made on the 9th day of November, 1878, setting aside the side bar rule issued by the defendant for costs of the day, should not be rescinded, and the summons granted by the said clerk discharged with costs, on the ground that the said order setting aside the said rule was improperly granted, and nothing appeared to disentitle the defendant to his costs of the day; or why, upon reading the further affidavits filed, the said

order should not be rescinded and the said summons discharged; or why such order should not be made as to the said costs of the day as to the Court might seem proper.

The record was entered for trial at the Assizes held at Chatham, in and for the county of Kent, on the 12th of October, 1874.

On the 26th of October, 1878, the cause having in the meantime been tried and a verdict entered for the defendant, the side-bar rule for costs of the day was taken out.

On the 5th of November, 1878, a summons was granted by the Clerk of the Crown in Chambers to shew cause why the said side bar rule should not be set aside with costs. No ground of objection was stated in the summons to the said rule, nor was reference made therein to any affidavits filed, but leave was given to file an affidavit on the return of the summons verifying the copy of the rule served, if necessary.

This summons was founded on an affidavit, made on the 2nd day of November, 1878, by the plaintiff's attorney, in which he stated that on the 13th day of October, 1874, the cause was reached on the docket, and the plaintiff was prepared to go on with it, when called on, but the defendant's counsel stated that he was not ready, that the defendant and his witnesses had not yet arrived; and upon his representation and at his request the case was not forced on by the plaintiff, though he was anxious to get the cause on then: that on the 14th day of the said month of October one of the plaintiff's witnesses, Thomas Holmes, Esq., who was present at the Court for the 13th, went to the village of Blenheim that evening or the next morning stating to his (the attorney's) client and to himself, that he would be back by noon of the next day, and be on hand if required then, though he did not expect the case would come on again so early as the next day: that the cause was called on for trial on the 14th, and although he represented to the Judge that the plaintiff had been ready the day before and could not be ready then owing to the absence of said Holmes, he (the Judge) insisted upon the

cause going on at once, the result being that he was forced to withdraw the record to avoid a nonsuit, as the defendant's counsel asserted that he was then ready to go on, and it was entirely owing to the fact that the defendant was not ready on the 13th that the said suit was not then tried and disposed of.

On the return of the summons no affidavits were filed in reply to the above affidavit of the plaintiff's attorney, the defendant relying on the insufficient cause shewn by the said affidavit to exempt the plaintiff from liability to the costs of the day.

On December 10th, 1878, *H. J. Scott* shewed cause. The application for the rule *nisi* was too late. A motion to rescind an order made by the Clerk of the Crown and Pleas in Chambers must be made to a Judge in Chambers within four days, and a single Judge sitting in Court has no right to entertain the motion. Then, on the merits. The order setting aside the rule for costs of the defendant was right: the reason the case was not tried was that defendant was not ready when it was first called, so that it was he that prevented the trial, and he cannot derive any benefit from his own neglect. The affidavits filed on granting the rule *nisi* cannot be read, and in reviewing the decision of the learned Clerk of the Crown only the material before him can be considered. He referred to Harrison's Common Law Procedure Act, sec. 224, page 323, and note on page 324. On the merits he cited *Pope v. Fleming*, 1 L. M. & P. 272; *Sleeman v. Governor & Co., of the Copper Mines of England*, 17 L. J. Q. B. 113; *Scott v. Crosthwaite*, 6 U. C. L. J. O. S. 159.

Osler contra. The plaintiff is right in coming to the single Court, and it is not necessary to move in Chambers within the four days. The Court always has jurisdiction. A motion was made in full Court, but it was referred to the single Court. Armour, J., only recently heard a case, (*Phippen v. McLeod*, not reported,) this Term, in appeal from the Clerk of the Crown in Chambers, which was referred, as this was, by the full Court to the single Court. He

referred to *Carrick v. Smith*, 34 U. C. R. 389 ; *Waddell v. Corbett*, 26 U. C. R. 243; *Re Allen*, 31 U. C. R. 458; *Cushman v. Corporation of Longueil*, 4 U. 2 C. R. 602 ; *Vanluvan v. Tolan*, 8 U. C. L. J. O. S. 276 ; *Bank of Upper Canada v. Covert*, 5 O. S. 324 ; *O'Neil v. Barnhart*, 5 O. S. 453; *Crooks v. Cummings*, 2 U. C. R. 380 ; *Crofts v. McMaster et al.*, 3 P. R. 121 ; *Taylor et al. v. Smith*, 2 P. R. 213.

20th December, 1878. CAMERON, J.—I do not think the plaintiff was prevented from trying this cause at the Assizes in October, 1874, by any act of the defendant, within the scope of the authorities, which decide that where the plaintiff does not proceed to trial through the defendant's fault, the defendant is not entitled to costs of the day. Where the defendant takes an objection to the state of the record and refuses to allow an amendment to be made, and his objection prevails, it is the direct act of the defendant that prevents the trial and causes the unnecessary costs, and it is most just to say he shall not receive costs under such circumstances. But where, as in this case, the defendant does not seek to prevent the trial, but asks for a postponement to allow of his witnesses being present, in order that the trial may properly take place, and the Court grants the indulgence, it cannot be said, when the plaintiff afterwards, through the absence of his own witness, who happened to have been present when the case was first called on, is forced to withdraw his record, that he is so forced by the act of the defendant. I am therefore of opinion that the order of the learned Clerk of the Crown in Chambers setting aside the rule for costs of the day should be rescinded, and the summons to set aside said rule discharged, unless I am precluded from hearing any appeal from the said decision by reason of the order not having been moved against in four days, in pursuance of the rule of Court in that behalf of Hilary Term, 1870.

By ch. 39 Revised Stat. O., sec. 29, the Judges of the Superior Courts of law were empowered to make

general rules for empowering the Clerk of the Crown and Pleas of the Court of Queen's Bench to do any such thing and transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the rules of practice of the said Courts or any of them respectively, are now, or may be hereafter done, transacted, or exercised by a Judge of either of the said Courts sitting at Chambers, and as shall be specified in any such rule, except in respect of matters relating to the liberty of the subject. By section 31 it is provided every order or decision made or given under this Act by the said Clerk of the Crown and Pleas sitting at Chambers shall be as valid and binding on all parties concerned as if the same had been made or given by a Judge sitting at Chambers, except that any person affected by any order or decision of the said clerk may forthwith, or within such time as may be appointed by any rules or orders to be made under this Act, and subject to such conditions as to costs as may be provided under any such rules or orders, appeal from such decision to a Judge sitting in Chambers. By sec. 26 of the above Act it is declared the Judges of the said Courts shall in rotation or otherwise sit in Chambers, and there transact any such business as may be transacted in either of the said Courts by a single Judge out of Court, whether such business be in the Court of which such Judge is a member, or in the other Court, subject to the right of appeal to, and of review by, the full Court in which the matter is depending.

This is a matter that is within the jurisdiction of a single Judge, and may be disposed of by me sitting in Court as such single Judge, unless there should have been an appeal in the first instance, and within four days after the decision in Chambers, to a Judge in Chambers, and this depends upon what is the proper construction to be given to the said sec. 31 of ch. 39 R. S. O. Without the exception contained in the clause the order or decision could only have been appealed against by application to

the full Court or to a Judge sitting alone as a Court, and the present application would have been properly made. The exception gives an additional or more speedy means of relief from an erroneous order, and does not take away the right of going to the Court by way of appeal from a decision made in Chambers. The rule should therefore be made absolute to rescind the order made in Chambers, setting the rule for costs of the day aside; costs to the defendant of the proceedings in Chambers, no costs to either party on the rule before me.

Rule accordingly.

RE TOWNSHIP OF N. NORWICH AND VILLAGE OF NORWICH.

Division of municipality—Bonus to railway—Arbitration.

On the separation of the village of Norwich from the township of North Norwich, in which it was situate, an arbitration took place under the Municipal Act (36 V. ch. 48, secs. 9, 25, O.)

A by-law had been passed by the county granting a bonus of \$50,000 to the Port Dover and Lake Huron R. W. Co., and authorizing debentures or the county to be issued therefor, to be provided for by a rate levied upon the town of Woodstock and the township of North Norwich. This by-law was legalized by 37 Vic. ch. 57, sec. 26, O., which provided that the company should indemnify the township to the extent of \$10,000 against any excess above two-fifths of the said debentures, and should give a bond securing such indemnity, which bond had been given:

Held, that the liability of the township under this by-law was a debt of the township, although secured by debentures of the county, and within the power of the arbitrators to dispose of, as well as the bond.

It was awarded as to the bond, that the village should be interested in it to the extent of \$10,009, and the township to the extent of \$8,991 for each \$10,000 thereof, and so in like proportion for any greater or less amount payable in respect thereof; and as to the money payable under the by-law, that the village should pay \$1 and the township \$8 for each \$6 thereof:

Held, that this mode of disposition was authorized, and unobjectionable. The award purported to be made "with the consent of the parties":

Held, that such consent referred to the matter being disposed of, and not to the mode of disposition.

Bethune, Q.C., on February 19, 1878, obtained a rule *nisi*, on behalf of the corporation of the Township of North Norwich, calling upon the corporation of the village of

Norwich to shew cause why a certain award made by Henry B. Beard and David Tisdale, two of the arbitrators appointed in pursuance of the statute in that behalf, on the separation of the village of Norwich from the township of North Norwich, bearing date the 21st of September, 1877, should not be set aside, with costs, on the grounds: 1. That as to the award made by the sixth clause of the said award the same was *ultra vires* of the arbitrators, and that the debt therein referred to was a debt of the county of Oxford, and not a debt of the township of North Norwich, and 2. That the said sixth clause was unjust, and should be varied by directing that the said liability should be borne by the said two corporations in the proportions of their respective equalized assessments from year to year. 3. That the fifth clause of the award purported to have been made with the consent of the said parties, whereas no such consent was given under a by-law of the council of the township of North Norwich. Or why the amount to be paid by the corporation of the township of North Norwich should not be reduced by such sum as to this Honourable Court might seem just, on the ground that the same was excessive and unjust.

The portions of the award material to be noticed were the following:—

4. That the last and only remaining asset of the said two corporations brought before us by them is a bond, dated the 5th of June, 1874, made by the Port Dover and Lake Huron Railway Company to the said corporation of the township of North Norwich, for the sum of \$20,000, subject to a condition for making the same void in case the said company should in each year, during the continuance of certain debentures therein referred to, pay to the said corporation of North Norwich all such sums in excess of two-fifths thereof that the said corporation of North Norwich should be compelled to pay, so as the same did not exceed the sum of \$10,000 and interest.

That on the 14th of December, 1876, there became due and payable, in respect of the said bond, by the said railway company, and in respect of the year 1876, the sum of \$711.20, and there may become due in respect of further

breaches of the said bond, in each of the ten next years, up to and including the year 1890, three further sums of money.

5. In respect of the said sum of money so due, and in respect of any further sums that may become due thereunder, with the consent of the said parties, we award as follows:

That the said corporation of the village of Norwich shall be interested in the said bond to the extent of \$1,009 for each \$10,000 thereof, and the said corporation of the township of North Norwich in the sum of \$8,991 for each \$10,000 thereof, and so in like proportion for any greater or less amount that may be recovered or payable in respect of the said bond. And that each of the said parties shall contribute in the like proportion to any costs that may be incurred in the collecting of the said moneys, so that such costs be incurred by and with the consent of each of the said parties.

6. We further award and determine that the only other debts due or payable by the said two corporations are certain moneys payable by the said two corporations and the municipal corporation of the town of Woodstock under by-law number 183 of the corporation of the county of Oxford, and confirmed by an Act of the Ontario Legislature on the 24th of March, 1874, and also certain moneys due by the said two municipalities under a by-law of the said corporation of North Norwich, passed 3rd November, 1873, to aid a railway therein described as the Norfolk Railway Company, as to which debts we do order and award that in respect of the share of the two corporations of the first named debt, payable on and after 1st January, 1876, and in respect of the secondly named debt, that the said village corporation shall pay \$1 for every \$9 thereof, and the said township corporation the remaining \$8; and that if either of the said corporations shall be compelled to pay in excess thereof, they shall be repaid such excess by the other corporation."

The further facts are sufficiently stated in the judgment.

November 23, 1878, *Robinson, Q.C., Fletcher*, with him, shewed cause, citing *In re the Township of Howick and The Village of Wroxeter*, 12 U. C. L. J. N. S. 2509; 36 Vic. ch. 48, O., secs. 9, 25.

Bethune, Q.C., supported the rule.

December 20, 1878. ARMOUR, J.—The unincorporated village of Norwich, situate in the township of North Norwich, was erected into an incorporated village apart from the township, by a by-law of the county, and thereupon the provisions of the Municipal Act for the disposition of the property and payment of debts upon the dissolution of a union of townships became applicable, as if the localities separated had been two townships, which provisions, so far as material to this controversy, are (1) "The two corporations shall be jointly interested in the other assets of the union, and the same shall be retained by the one, or shall be divided between both, or shall be otherwise disposed of, as they may agree"; and (2) "The one shall pay or allow to the other * * in respect to the debts of the union, such sum or sums of money as may be just." 36 Vic. ch. 48, sec. 25, O.

The councils of these respective municipalities being unable to agree, arbitrators were appointed under the provisions of the Act, two of whom made the award in question, the third refusing to join in it.

A by-law was passed by the council of the county of Oxford in 1873, under, or purporting to be under, sec. 472, and sub-sec. 3 of sec. 473, of 36 Vic. ch. 48, O., granting a bonus of \$50,000 to the Port Dover and Lake Huron Railway Company, authorizing the issue of debentures therefor, and providing for the levy of an annual rate upon the town of Woodstock and the township of North Norwich to meet the said debentures as they should fall due.

By Statute 37 Vic. ch. 57, sec. 26, O., this by-law was legalized, and it is thereby provided "That as between the said company and the municipality of North Norwich, the said township is to be liable for two-fifths only of the said debentures to be issued under the said by-law of the county of Oxford, and interest thereon, and that the company is to indemnify that municipality in respect of the said debentures beyond the proportion aforesaid, including interest on the excess annually, but so that the amount of the said indemnity do not exceed \$10,000 and the interest thereon,

and that a bond be executed by the company securing the above indemnity, which bond shall be a first lien on all the property of the company in the counties of Norfolk and Oxford, including the track and road bed, and that such bond shall not need registration in order to preserve the priority of such lien."

The bond referred to was given to the township by the railway company.

Before the arbitration was held the council of the corporation of the township of North Norwich, by a resolution duly passed, proposed to the corporation of the village of Norwich a basis of settlement, one of the terms of which was, "As to the Port Dover Railway bonus, the future payments to be determined by the yearly equalization to be levied by the county council, and North Norwich will execute an agreement to pay the village corporation their share of the rebate when paid back by the company, such share to be computed on the basis of the yearly equalization of the county council." At the arbitration this basis was again proposed by the township to the village, and in the statement of the liabilities of the township, placed by the township before the arbitrators, "By-law No. 183, County of Oxford, Port Dover and Lake Huron by-law, grouped with Woodstock, \$50,000," appears; and during the arbitration it was never at all objected that the liability of the township under this by-law was a matter with which the arbitrators had no power to deal.

The bond referred to was also brought before the arbitrators by the township as an asset to be dealt with by them, and it was not objected then, nor is it now objected, that it was not a matter to be dealt with by the arbitrators. The arbitrators awarded that the village should be interested in this bond to the extent of \$1009 for each \$10,000 thereof, and the township to the extent of \$8991 for each \$10,000 thereof, and in like proportion for any greater or lesser amount that might be payable in respect thereof.

The only objection made to this disposition of the bond is that it purports to have been made with the consent of

the parties, but I think it clear that the words "with the consent of parties" refer only to the consent of the parties to the bond being disposed of by the arbitrators, and not to the mode of disposing of it. But even if this were otherwise, I would not, on this ground, interfere with the award, because it is plain from the papers filed that the arbitrators exercised their deliberate judgment apart from any consent upon the disposition to be made of the bond, and their award with regard to it is the result of such deliberate judgment apart from any such consent.

With regard to the liability of the township under the by-law above referred to, the arbitrators awarded that the village should pay \$1 for every \$9, and the township \$8 for every \$9 thereof.

I see no objection to this mode of dealing with the liability in question, and I do not think that the arbitrators were bound to deal with it in the manner proposed and contended for by the township, but that they could deal with it in such manner as they deemed just; and I see nothing from which I can conclude that their mode of dealing with it was unjust, and I cannot therefore interfere with their award on this ground.

But it is contended now, for the first time, that the debt created by the by-law was the debt of the county of Oxford, and not a debt of the township of North Norwich, and that the arbitrators had no power to deal with it at all. I cannot accede to this contention.

It is true that the debentures issued under the by-law constitute a debt of the county of Oxford, but the same by-law in effect makes the town of Woodstock and the township of North Norwich liable for the payment of them.

Now the word "debts" in the second provision above quoted, does not mean debts in the legal and restricted application of the term, but in the wider and popular sense of liabilities.

The special rate imposed by the by-law upon the town of Woodstock and the township of North Norwich, created a liability on the part of each to pay its proper proportion

of such rate, and in my opinion the liability of the township of North Norwich in that regard was a debt within the meaning of the above provision, and as such was properly within the powers of the arbitrators. The legislation above referred to with regard to this liability tends to shew that the liability in this case, at all events, was a proper matter for the arbitrators to deal with. The bond was, it is conceded, proper for them to dispose of, and why not then the liability as an offset to which the bond was given? It might lead to injustice if they should dispose of the one, and not deal with the other.

In my judgment, the rule should be discharged, with costs.

Rule discharged.

IN RE FERGUSON AND THE TOWNSHIP OF HOWICK.

Drainage by-law—Omission to publish notices.

Held, that where a drainage by-law had been published without the notice of the holding of a Court of Revision for the purpose of hearing complaints against the Assessment at some day, "not earlier than twenty, nor later than thirty days from the day on which the by-law was first published," as required by the Municipal Act, R. S. O. ch. 174, sec. 529, sub-sec. 8, it was bad, and must be quashed.

The non-publication of the notice required by section 531 is not fatal to the validity of a by-law.

ON 22nd November, 1878, *H. J. Scott* obtained a rule, calling on the township of Howick to shew cause why by-law No. 10 should not be quashed, in whole or in part, with costs, on the grounds, that the council of the township of Howick appointed the holding of the Court of Revision for the trial of complaints against the assessment under the by-law at a day later than thirty days from the day on which the by-law was first published, contrary to the Rev. Stat. ch. 174, sec. 529, sub-sec. 8: that no notice that any one intending to apply to have such by-law, or any part thereof, quashed, must, within ten days after the final passing thereof, serve a notice in writing upon the reeve or other head officer, and upon the clerk of the municipality, of his intention to make application for that purpose to one of Her Majesty's Superior Courts of law at Toronto during the Term next ensuing the final passing thereof, was published with the said by-law, or posted up conspicuously at four or more of the most public places in the municipality, as required by Rev. Stat. ch. 174, sec. 531: that the by-law did not provide for assessing and levying upon the real property to be benefited by the drainage under the by-law a special rate sufficient for the payment of the principal and interest of the debentures to be issued under the by-law, as required by Rev. Stat. ch. 174, sec. 529, sub-sec. 3: that no notice was given of the holding of a Court of Revision to hear complaints against the assessment under the by-law, the only notice published being for a wrong day: that lots Nos. 11 and 12, concession A, of the said

township, and the centre of lots No. 9 and 10, concession B, were made to contribute to the said drainage, although the drain did not pass through them, nor were they benefited thereby; and that no notice of the holding of a Court of Revision for the trial of complaints against the assessments on the said by-law was published with the said by-law during the first three weeks of its publication, or posted up in four of the most conspicuous places in the said municipality.

The affidavit of the applicant, *John Ferguson*, stated that he was owner of lot No. 15, concession B, in Howick: that the by-law No. 10, marked as exhibit A, was finally passed on the 16th of October, 1878: that the copy of by-law, marked B, was the copy which was published by the council of the township: that there was only one newspaper published in the township, and that the copy of by-law marked B was published in the said newspaper, and the first publication thereof in the said newspaper was on the 30th of August, 1878: that during the first three weeks of the publication no notice was published with the by-law, or otherwise, of the sitting, or meeting, or holding of the Court of Revision of the township for the trial of complaints against the by-law, or otherwise, and in fact no notice of any kind was at any time published in any newspaper, or otherwise, of the sitting, meeting, or holding of the Court of Revision for the purpose aforesaid, on some day not earlier than twenty and not later than thirty days from the day on which the by-law was first published; and in fact, the only notice of any kind at any time published with the said by-law, was the notice, a true copy of which was annexed, marked C: that no notice was published in the said newspaper with the by-law, or in the said newspaper at all, "that any one intending to apply to have such by-law, or any part thereof, quashed, must, within ten days after the final passing thereof, serve a notice in writing upon the reeve or other head officer, and upon the clerk of the municipality, of his intention to make an application for that purpose to one of Her Majesty's Superior Courts of law at Toronto during the term next ensuing the final passing of the by-law":*

that the said corporation did not at least three weeks before the final passing of the by-law post up conspicuously a copy of the by-law and of the said notices at four of the most public places in the municipality, and in fact did not do so at all: that the only notice posted up by the said corporation, with the copy of the by-law, was that at the foot of the copy of by-law, marked D, and no other notice was posted up by the corporation: that on the 10th of October, 1878, at ten of the clock in the forenoon, he attended, at the time and place mentioned in the notice marked C, for the purpose of complaining against and opposing the same and the draining of the lots mentioned in the by-law, but no Court of Revision was held on that day, and no one member of the Court of Revision attended at the time and place mentioned in the said notice, or on the day therein mentioned: that he saw B. S. Cook, the deputy reeve of the township, and one of the members of the Court of Revision, on the same day, and he told him there would be no Court of Revision on that day, as the clerk of the township had made a mistake in calling the Court for Wednesday the tenth, when it should have been Thursday the tenth day of October: that on the 22nd of October last he served the reeve of the township, and on the 23rd of October last he served the clerk of the township with a notice, of which the annexed paper E was a duplicate.

The by-law A, as finally passed, had appended to it the proper notice, as stated at * in the above affidavit, which was in accordance with R. S. O. ch. 174, sec. 531.

By-law B was the copy published in the newspaper of the municipality, and the only notice appended to it was the following:

“Take notice, that the above is a true copy of a proposed by-law, which will be taken into consideration, and passed at the council meeting to be held at Hainstock’s Hotel, Fordwich, on Wednesday, the 16th day of October, A.D. 1878.”

The by-law was published on the 30th August, 1878, in the newspaper, and no notice was published with it

during the first three weeks of its publication for the hearing of complaints by the Court of Revision.

The notice which was published specified *Wednesday*, the 10th of October, as the day the Court of Revision would sit, in place of *Thursday*, the 10th, or in place of *Wednesday* the 9th.

The by-law D. was posted up, but it did not contain the notice of the time of meeting of the Court of Revision.

For the township *John Kaine*, the reeve of the township, made affidavit, that finding there had been a mistake in naming *Wednesday*, the 10th of October, in place of *Wednesday* the 16th, a representative of the council attended for the purpose of informing any one intending to complain that the Court would be held on the 16th of October: that the applicant attended on the 10th of October, and was informed the Court would meet on the 16th of October, and he did not object to it: that on this last day the Court met and the applicant attended and urged that the proposed ditch would not benefit the land: that the complaint was fully heard and considered, and the Court, at the request of the applicant, adjourned and made a personal inspection of the premises, and afterwards, upon the return, and in the presence of the applicant, to the best of the deponent's recollection, dismissed the complaint, and finally passed the by-law.

No one complained of the by-law but the applicant.

The by-law was founded upon the report of the Civil Engineer and Provincial Land Surveyor, as to the lands to be benefited by the proposed ditch.

It was the intention of the council to amend the by-law by fixing the special rate and filling up the columns left by oversight blank in the by-law with the proper amounts, such special rate and amounts being mere matter of calculation.

In reply, the applicant filed an affidavit, in which he stated that no representative of the council attended either on *Wednesday* or *Thursday* the 9th or 10th October, as stated by the reeve in his affidavit, and that the applicant

got his information, as before stated, by his calling on the deputy reeve at his house, that a meeting would be held on the 16th, but that he, the applicant, need pay no attention to it, unless he got notice to attend: that he received no such notice, but he did attend on Wednesday the 16th. On that day the council met for the purpose of passing the by-law.

Then the applicant said: "At said council I did object that the by-law could not be passed without a legal Court of Revision being held to hear complaints: that, notwithstanding my complaint, the council did proceed to pass the by-law, and after it was passed the council went and inspected the property affected by the by-law: that the by-law was passed on the 16th, and the council did not inspect the premises until Tuesday following. I lodged no complaint before the Court of Revision, because no Court was held at which I could lodge such complaint, and my complaint was never heard and considered by the Court of Revision, for the reason aforesaid.

The reeve told me after the by-law was passed that as to the irregularities the only thing the council could do was, to pass the by-law and then kill it.

I never, in any way, assented to the not holding a regular Court of Revision, and for passing the by-law: that if it remain in force it will do me a great injury, and if I had had an opportunity of submitting my claim to the Court of Revision, I believe I could have satisfied a majority of the Court that my complaint was well founded, or that, at all events, upon appeal, I could have satisfied the proper Judge that my complaint was well founded."

January 29, 1879, *Osler* shewed cause. As to the want of due notice in this case under section 531, it is not worded as section 506 is, as to closing up roads. There it is that "No council shall pass a by-law for stopping up, &c., until written or printed notices" are given. Here it is that "before the final passing of the by-law it shall be published," &c. The Court will not interfere in a case of

this kind if no injury be done to any one, and if a full opportunity has been given to every one to be heard against the by-law: *Parker v. The Municipalities of the United Townships of Pittsburgh and Howe Island*, 8 C. P. 517; *Lafferty v. The Municipal Council of Wentworth*, 8 U. C. R. 232; *Scarlett v. The Corporation of York*, 14 C. P. 161. A special rate is required to be fixed by section 529, sub-sec. 3. But clause 3 of the form of the by-law given in section 530 shews the special rate may be ascertained by adding the interest to such rates against each lot, and dividing that compound sum into so many equal parts as the debentures have years to run, one part of which compound sum so divided shall be assessed and levied in each year for the number of years the debentures have to run; and that has been done in this case: *Re Hawke v. Wellesley*, 13 U. C. R. 636; *Canada Co. v. The Municipal Council of Middlesex*, 10 U. C. R. 93; *Montgomery and The Township of Raleigh*, 21 C. P. 381. He also referred to *Re County of Essex and The Township of Rochester*, 42 U. C. R. 523.

Scott, contra. By-law B, which is the copy of the one published, had neither the notice to persons calling on them to notify the reeve and clerk of their intention to oppose the by-law, nor the notice of the time and place of meeting of the Court of Revision to hear complaints against the by-law or assessment. These notices should have been published with the by-law. That was never done. But the notice to parties intending to oppose the by-law to give notice of their intention to do so, was appended to the copies of the by-law which were posted up. The Court of Revision should have sat not later than thirty days from the 30th of August, the day of the first publication, and not sooner than twenty days from such first publication; but here the Court, if one sat at all, did not sit until more than two weeks after these thirty days. The by-law does not state when the debentures are to be issued, and the special rate cannot be properly computed.

February 4, 1879. WILSON, C. J.—The by-law published in the newspaper had neither the notice to persons intending to move to quash the by-law to serve the notice in writing of their intention upon the reeve and upon the clerk of the township according to section 531, nor the notice that complaints against the assessment would be heard before the Court of Revision, which would be held on a day not earlier than twenty days nor later than thirty days from the day on which the by-law was first published, according to section 529, sub-section 8.

The want of the first mentioned notice would not invalidate the by-law. The object of it is, to restrict the party complaining to moving against the by-law in the Term of the Superior Courts of law next after the final passing of the by-law; and if the notice be not given, the party would have the period of one year for making his motion, according to section 323.

The absence of the second notice is more material, because its purpose is to fix a day when the Court of Revision will be held, in order that the parties affected by the by-law may appear and make their complaints against their assessments; and the day to be so fixed is to be not less than twenty days nor more than thirty days from the day on which the by-law was first published. No such notice was published within that time, nor any day fixed for holding the Court within that time.

It is not said when that notice was first published. It seems to have been a notice published of itself in a newspaper.

The copy of the by-law posted up had not the notice of the time and place of meeting of the Court of Revision attached to it.

The notice of the meeting of the Court of Revision published stated the Court would be held on Wednesday, the 10th of October. That day was the 9th of the month. The applicant attended on Wednesday the 9th and Thursday the 10th, to make his complaint, but no Court was held on either of those days.

No other formal notice was given of the meeting of the Court, but it was arranged that the Court, in consequence of the mistake as to the day which was made in the published notice, should be held on Wednesday, the 16th of October. Upon that day the applicant attended, and the council was in session.

The applicant contended the by-law could not be passed, as there was no legal Court of Revision to hear complaints, but the council did nevertheless proceed to pass, and did pass the by-law.

The applicant contends the Court of Revision, if it had decided against his complaint, might have had its decision reviewed on appeal by the County Judge, and such an opportunity should have been allowed to him before the final passing of the by-law : Section 530, sub-section 2.

If the Court of Revision did decide against the applicant, he should have been allowed the like time for appealing against such decision which is allowed to appellants in ordinary cases of assessment under the Assessment Act—R. S. O., ch. 180, sec. 59, and sub-sections ; and the council should not finally have passed the by-law until the Judge had given his decision and duly notified it to the clerk of the township : Section 65.

In this case I should have gone far to sustain the proceedings of the township council for any defective notice ; but I am not sure that I could have held any notice to be valid which was not given “not earlier than twenty nor later than thirty days from the day on which the by-law was first published” : Section 529, sub-section 8.

The want of a notice both to the published and posted by-law, as to the time and place of the meeting of the Court of Revision, is a serious objection, which cannot, I think, be cured by the isolated notice to that effect printed in the newspaper.

Besides, that separate notice was not given “not earlier than twenty nor later than thirty days from the first publication of the by-law.” It does not appear when it was given ; and when published it was defective by a mistake,

either as to the day of the week or the day of the month, or both.

Now it is important that notice should be correct, because it is the only notice which those entitled to complain are to receive under these sections, while under the Assessment Act they would, besides being notified by public advertisement, be entitled to receive a special notice from the clerk of the township of the day and place of meeting: section 56, sub-secs. 8, 9, 10, 11, 12.

After all these proceedings taken, and all of them erroneous in some respect, the applicant and the council at last met on the 16th of October, and then the applicant either had no opportunity to complain, because there was no Court of Revision duly constituted, or he was heard and his claim was decided against.

I think the former was the case. If, however, he was heard, and his claim was dismissed, he had still the right of appeal, and the by-law should not have been finally passed, as he had still five days within which to appeal to the County Court Judge.

I should not have interfered with the by-law, although finally passed on the 16th of October, after adjudicating upon the assessments complained of, without waiting for the expiry of the five days allowed to the parties to appeal to the Judge, if no notice of appeal was given within that time, or if the parties had declared they would not appeal.

Nor would I have interfered with the by-law if, notwithstanding its final passing, the party had appealed to the Judge, and his appeal had been heard, and the council had conformed to that decision by amendment of the by-law or otherwise.

Here, however, I am not convinced there was ever a legally constituted Court of Revision summoned or held, and I do not think the applicant has had his case heard or adjudicated.

I do not know that he has any just cause of complaint. I only know that he has the right to complain, and if he do that, he has the right to be heard, and if he be heard, and

his complaint be not allowed or redressed, he has the right to appeal by way of a final adjudication ; and he has not been allowed the opportunity of being duly heard against this coercive taxation.

For these reasons I must make the rule absolute, with costs.

I think the by-law is not objectionable for not, in so many words, fixing a special rate. The case of *Montgomery and The Township of Raleigh*, 21 C. P. 381, is in point.

Rule accordingly.

REGINA V. HESSEL.

Conviction—Medical practitioner—R. S. O. ch. 142, sec. 40—32-33 Vic. ch. 31, sec. 73.

- A conviction for practising medicine without license or being registered as a medical practitioner, under R. S. O. ch. 142, sec. 40, omitted to add "for hire, gain, or hope of reward," and it did not appear that the defendant had appeared and pleaded, and that the merits had been tried, and that the defendant had not appealed, or that the conviction had been affirmed on appeal; so that the 32-33 V. c. 31, s. 73, was not applicable. *Held*, that the conviction must be quashed.
- A conviction should, if possible, state the facts necessary to bring it within that section, and it should not be drawn up until the four days for giving notice of appeal have elapsed.

December 3, 1878, *F. Osler* obtained a rule *nisi*, calling upon Daniel D. Campbell, one of Her Majesty's justices of the peace in and for the county of Perth, and Robert Woods, of the town of Listowel, in the said county of Perth, constable, the informant, to shew cause why the conviction made by the said Daniel D. Campbell, dated on or about the twenty-fifth day of May last, whereby the said Frederick Hessel was convicted for practising medicine without a license or registration as a medical practitioner, as required under ch. 142 of the Rev. Stat. Ont., should not be quashed, upon the ground, among others, that the evidence did not disclose any offence within the statute, (R. S. O. ch. 142), and the charge should have been dismissed by the justice for want of evidence.

January 28, 1879, *Ewart* shewed cause. The defendant has acquiesced and paid the fine, and is therefore estopped from objecting to the conviction. Objections for want of form are discountenanced by the statute, and care is taken that it shall not vitiate. He referred to 32-33 Vic. ch. 31, D., secs. 5, 12, 21, 22, 67, 68, 71, 73.

Osler, contra. The conviction does not state that the defendant practised for hire, gain, or hope of reward, and therefore there is no offence under the Act alleged, and probably the justice did not think that there was any hope of reward.

February 4, 1879. WILSON, C. J.—The conviction is, that the defendant “did practise medicine without a license, or without being registered as a medical practitioner, as required under ch. 142, Rev. Stat. Ont. And I adjudge,” &c.

The statute, sec. 40, enacts that “It shall not be lawful for any person not registered to practise medicine, surgery, or midwifery for hire, gain or hope of reward; and if any person, not registered pursuant to this Act, for hire, gain or hope of reward, practises, or proposes to practise, medicine, &c., he shall, on a summary conviction thereof before any justice of the peace, for any and every such offence, pay a penalty not exceeding \$100, nor less than \$25.”

The chief objection to the conviction is, that it does not state the defendant practised medicine “for hire, gain, or hope of reward.”

As it stands at present, it is a fatal objection.

The question is, whether it can be amended by the insertion of these words.

The information is regular in that respect, and the evidence sustains it.

In cases of appeal they are to be heard and determined upon the merits, notwithstanding any defect of form or otherwise in the conviction. 32–33 Vic. ch. 31, sec. 68. And by section 73: “In all cases where it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and that the defendant has not appealed against the conviction where an appeal is allowed, or, if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case.”

Here *it does not appear by the conviction* that the defendant appeared and pleaded, and that the merits have been tried, and that the defendant has not appealed, or that the conviction has been affirmed on appeal.

The conviction might well state that the defendant “had appeared and pleaded,” when that is the fact. It might

also state that "the merits have been tried." But it is difficult to understand how the conviction can state that the defendant has not appealed, unless the drawing up of the conviction is postponed until after the expiry of four days after the time when the note of conviction was made, in which case, if no notice of such appeal has been given, by section 65 of the same Act, the justice might, in drawing up his conviction, state that the defendant had not appealed, because it would then be too late to appeal.

If there has been an appeal, the conviction will be finally dealt with by the general Sessions of the Peace, under section 68 of the Act.

I cannot discover from the conviction that the defendant appeared and pleaded, and that the merits have been tried, and that the defendant has not appealed against the conviction. If these matters had appeared, I think I should not have proceeded further upon this writ. As it is, I feel obliged to say that the conviction is defective in a very material part of the charge. There is, in fact, at present no charge in law. It is not punishable to practice medicine without being registered under the statute, and that is all the defendant has been convicted of. It is only punishable if he practise medicine, without being duly registered, "for hire, gain or hope of reward," and it is not said he did so.

In every conviction the justice should state, if the facts allow of it, 1. That the defendant appeared. 2. That he pleaded. 3. That the merits were tried. 4. That the defendant had not appealed, or 5. That he had appealed—in which latter case the application to quash upon the *certiorari* would fail; and for that purpose the conviction should not be formally drawn up until the four days for giving the notice of appeal have gone by.

I have no alternative but to make the rule absolute quashing the conviction.

Rule absolute, without costs.

HILARY TERM, 42 VICTORIA, 1879,

From February 3rd to February 15th.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

MOLSON'S BANK V. GIRDLESTONE ET AL.

Principal and surety—Negligent loss of security—Discharge of surety.

Upon the evidence in this case it was held to have been rightly found at the trial that the defendant endorsed the notes sued on on the understanding and agreement with the plaintiffs, by whom they were to be discounted, that the proceeds should be applied in the purchase of pork, on which the plaintiffs were to take and hold security for the payment of the notes: that the plaintiffs had such security on pork which was of greater value than the amount of the notes; and that the plaintiffs through their negligence lost such security, the makers either having been allowed to sell the pork and receive the proceeds, or such proceeds having been received by the plaintiffs and applied to other liabilities of the makers: *Held*, that the defendant was discharged. As between these parties it was held unnecessary to discuss the right of the makers to give valid warehouse receipts for such pork to the plaintiffs, there being enough shewn to create a valid pledge of the pork, for the special purpose of the agreement, and to provide a fund to which the defendant looked for protection.

The alleged impracticability of the bank attending to the sale and disposition of such property in their ordinary course of business was held immaterial, there being an express agreement as above stated.

THE declaration contained three counts, the first being on a note, at two months, made by Girdlestone, Orris & Co., dated 18th August, 1877, payable to the order of the defendant White, for \$5,000, and by him endorsed to the plaintiffs. The second count was on a note, dated 11th August, 1877, by the same parties and for the same amount,

payable to the order of the defendant Patterson, at two months, and endorsed by him and White.

The defendant White, upon whose defence the only question arose, pleaded :

1. Payment.

2. Payment by the makers.

3. That he endorsed for the accommodation of the makers as their surety only, and without value or consideration, and that the plaintiffs had notice of this : that such endorsement by him and defendant Patterson was for the purpose of enabling the makers to get the notes discounted by plaintiffs under agreement between plaintiffs and defendants that the proceeds should form and be placed to a special account between plaintiffs and the makers, to enable the makers to make certain purchases of goods : that the payment of said notes should be secured by certain valuable warehouse receipts then attached thereto, and which receipts were transferred and delivered to plaintiffs, who became entitled thereto, and to the property comprised therein, at the time said notes were discounted by them, and the property and goods comprised in and secured by said warehouse receipts were greater in value than the amount of the notes, and defendant White was in equity entitled as such surety to the benefit, advantage, and security of the same, and the proceeds of any sale thereof ; and plaintiffs afterwards, without defendant's assent or knowledge, gave up the warehouse receipts, or the property covered thereby, and possession thereof to the makers, and permitted them to resume and take possession thereof and sell and dispose of same for their own use, whereby defendant White had lost the benefit of said securities, and was in equity discharged from liability.

4. Setting out the same averments, and that the property was sold by the makers with plaintiffs' assent, and the proceeds, amounting to more than plaintiffs' claim on the notes, were paid by the makers to plaintiffs, who wrongfully, and in fraud of defendant White, applied the proceeds to other debts due them by the makers; and defendant claimed

to have them applied towards this claim, and that he was discharged from all liability.

5. That time was given to the makers without defendant's assent.

Issue.

The case was tried at Sandwich, before Armour, J., at the Spring Assizes for 1878, without a jury.

It appeared that Girdlestone & Co. were in business at Windsor, and were in the habit of purchasing hogs in Chicago, bringing them to Windsor, where they were slaughtered and the pork shipped for sale at various points. White, the defendant, swore that G. & Co. applied to him to endorse for them; that he agreed to do so on condition of warehouse receipts being given by G. & Co. as security, to be attached to the notes; that after consulting with Mr. Blakeney, the bank agent, and telling him of the proposed arrangement, the latter said he thought the defendants would be quite safe unless the hogs were destroyed, or something of that kind happened. Defendants endorsed the notes, leaving them with one Odette, a cousin of his, who was G. & Co.'s book-keeper, with an understanding with him individually that he was not to give them to the bank without the receipts attached representing the hogs or property intended to be purchased with the proceeds. Defendant White said it was understood that a special account was to be opened in the bank for this transaction. When Odette gave the notes to the bank defendant said he went and saw them there, with the receipts attached, as they appeared at the trial. Girdlestone confirmed this in substance and said it was agreed between Blakeney and himself that defendant White should endorse, and that G. & Co. should give warehouse receipts. They were applying to the bank for funds to buy hogs in Chicago. As soon as the hogs arrived they were slaughtered and warehouse receipts given therefor, and Odette annexed them to the notes. Girdlestone swore that they afterwards sold the hogs for either \$13,000 or \$18,000, and paid the proceeds into the bank. He said it was arranged that this dealing was to

be separate and distinct from former dealings in which G. & Co. owed the bank. Odette swore that White left the notes endorsed with him, he knowing the arrangement. White told him to fill them out and hand them to Girdlestone or the bank, to obtain the discount of \$1,500, and he (Odette) was to see that White was properly secured.

On the 11th of August, (the date of two of the notes,) Odette took them to the bank. The other notes were about a week later. Warehouse receipts, signed, but the quantities not filled in, were attached to the notes in the bank, when the discount was obtained to purchase the hogs in Chicago. When the hogs reached Windsor and were slaughtered, Odette got a memorandum of the weights; seven cents a pound was the price agreed between all the parties to be estimated on them. Two of the notes, for \$5,000 each, were dated the same day, August 11th, and a warehouse receipt for 144,251 lbs., at seven cents, \$10,097.57, representing 632 hogs, was filled up and attached to one of these notes.

The receipt was in the usual form by G. & Co., as received in store from themselves to be delivered on their order, and on the back it was endorsed, "Deliver to the order of the Molson's Bank, Girdlestone, Orris & Co.,"

This receipt was designed to cover both the notes. On the 18th of August the other note was dated and a like receipt was attached to it, prepared and filled up as the preceding one. It covered 290 hogs, 68,645 lbs., \$4805.15, in the same form, and was endorsed to plaintiffs as the other. Printed forms were attached to the receipts, declaring that plaintiffs could sell the property, which was endorsed to the bank as collateral security for repayment of advances made; with many provisions, one being that neither the taking of this property as collateral security, nor the authority to sell same should affect the rights of the bank on paper discounted against any one or more of the parties thereto. G. & Co. signed this printed memorandum, but the many blanks in it were unfilled.

Mr. Blakeney admitted that it was arranged with Girdle-

stone that there should be warehouse receipts given in the interest of the bank, but he did not understand that White had stipulated for them : that when G. & Co. wanted this advance, the name of White was proposed by them to him as indorser : that White came to him about the time they were discounted, and asked if they had got the warehouse receipts for the notes he had endorsed, and the agent shewed them to him : that he did not know that there was any arrangement that they should be attached for White's protection : that there was no agreement for a special account, but the proceeds were paid into general account with G. & Co. ; but that they did open a special account, but not, as he said, in reference to White's advance : that the receipts were given by the party to whom the advance was made, and they relied mainly upon the endorsers of paper of that kind, and that he did not undertake to look after these meats,—that he could not have done it personally : that they were given for the purpose of the stuff coming into their possession : that the special account was opened to enable them to keep track of the stuff and the sales, &c.

Orris, one of the partners of G. & Co., swore that he thought that \$20 would cover the outside loss on this consignment of pork.

The learned Judge found as follows : "I find that White endorsed the notes on the understanding and agreement that the proceeds were to be applied in the purchase of pork, upon which plaintiffs were to take and hold security for the payment of the notes : that plaintiffs had security upon the pork for payment of the notes, which pork was of greater value than the amount of the notes, and that plaintiffs through their negligence lost the securities thus taken ; and I therefore find the defendant White to be discharged."

A verdict was rendered for defendant White, and against the other defendants.

In Easter Term last *C. Robinson*, Q. C., obtained a rule *nisi* to enter a verdict for the plaintiffs against the defen-

dant White, for the whole claim, or such part as the Court might direct, and for a reference, if necessary, to determine the amount.

Nov. 29th, 1878, *Bethune*, Q. C., shewed cause. The learned Judge at the trial found that there was an agreement between the bank and White, on the faith of which he endorsed the note sued on, that they would take bills of lading and warehouse receipts of the pork to be purchased with the proceeds of the note, and the evidence sustains the finding. It is shewn that the bank did take the warehouse receipts, but afterwards permitted the pork to be sold and delivered by Girdlestone to other persons: the value of the pork was more than sufficient to pay the debt. The cases in equity shew that it is quite clear that in such case a surety is discharged. It is, moreover, shewn here that the bank received the whole of the proceeds of the sale of the pork, which went to a special account, and the debt has in fact been extinguished.

Robinson, Q.C. (*Magee* with him) contra. The general proposition is not disputed, that if a principal by gross negligence waste the security which he holds, he discharges the surety *pro tanto*; and if a party take warehouse receipts he must take care that he does not by gross negligence render them unavailable. Here the pork could not be kept track of: no bank could do so; the nature of their business is such as to render this utterly impossible. The defendant White was aware of this, and there was no negligence in plaintiff's in not doing what, under the circumstances, was impossible. They referred to 34 Vic. ch. 5 sec. 48, D., 35 Vic. ch. 8, sec. 5, D.; *DeColyar* on Guarantees, 340, 344; *Story's* Eq. Jur., last ed., sec. 326; *Robinson & Joseph's* Dig. 8280.

8th February, 1879. HAGARTY, C. J.—I do not see how we can interfere with the findings of the learned Judge. The weight of evidence seems strongly in favour of the conclusion that he arrived at.

The fair result seems to be this, that there was an understanding, such as the defendant White asserts here, and that

the bank was aware of the terms on which and on which alone he agreed to indorse.

It does not seem very clear as to the furnishing of the money to purchase the hogs in Chicago before there was any property in G. & Co.'s hands, to which a warehouse receipt could apply ; but it seems reasonably clear that the parties all understood and agreed that when the hogs should reach Windsor and be slaughtered, the receipts should be completed and endorsed to the bank for the special protection of the notes on which defendant was accommodation endorser.

We then have the case of a property specially pledged to the bank for this purpose, and a liability contracted by defendant White, on the faith of such pledge being given, and a security created.

It is not necessary to discuss, as between these parties, the right of G. & Co., not being warehousemen, to give valid receipts under the statute. There was enough, at all events, done in this case to create a valid pledge or hypothecation of this pork for the special object of the contract entered into between the parties. There was in effect a fund provided on which the bank held a controlling power, and to which the endorser, as surety, looked for his protection and indemnification.

If White had paid the notes at maturity he would have been entitled, if the property still existed, to have required the bank to assign it to him, or to sell and realize, or if sold by them to account for the proceeds as applicable to his indemnification. If by allowing G. & Co. to deal with it as their own the property had been lost, the surety would have been discharged.

In the present case the property appears to have been sold and the proceeds received by the bank, but apparently applied to other debts due by G. & Co., of whom they were very large creditors,

It does not seem to matter whether the bank permitted G. & Co. so to deal with the property as to have themselves received the proceeds thereof, or whether the bank

received them. In either case the defendant White must have the benefit of these proceeds. Or if, in the words of the learned Judge's finding, the goods were lost by the bank's negligent dealing with them, the surety equally became exonerated to the extent of the loss.

Wulff v. Jay, L. R. 7 Q. B. 756, is a very strong case. The defendant had become surety for one Burns, by a deed under which Burns assigned certain property to plaintiffs in security sufficient to cover the debt. Plaintiffs, with power of sale on default, did not take possession after default nor register their security. Burns became insolvent and the trustees took possession.

Cockburn, C. J., says, that "it is a common and well known proposition that where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security available." He then notices the right of the surety on payment to receive from the creditor the security held therefor for his protection; and that the plaintiff, by his neglect, had placed the surety in a very detrimental position.

The defendant, the surety, was held discharged, except for a small amount, being the difference between his liability and the actual amount realized from the property.

The law is very fully discussed by Lord Blackburn in *Polak v. Everett*, L. R. 1 Q. B. Div. 675. He says: "*Wulff v. Jay* was perfectly rightly decided, that where a person is a creditor with a pledge or surety he is in equity bound to account not only for the money he has actually made out of the pledge, but also for the moneys he might, ought, and should have made out of the pledge, and he must allow for that whether he made them or not; and if by laches he has diminished the value of the pledge, he is bound to allow for the sum he ought to have made. * * * In the present case it is not a question of laches, or not making the best of the pledge that could be made, but it is a case of preventing the surety having any recourse against these book-debts at all. * * * It

seems to me the principle must equally apply if he alters the surety's privilege of coming upon a security, being a security for the whole undivided debt, although of less value, as if he had altered a security of equal value with the whole debt."

As soon as we find the fair result of the evidence to be that the defendant became surety to the bank on the terms stated by him, his defence seems to us to be established.

We are not concerned with the alleged impracticability of a bank attending to the sale and disposition of property like this in the ordinary course of business. We have only to ascertain if the contract was entered into as alleged.

On the whole, we think the rule must be discharged, and the verdict for the defendant White stand.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

ALLEN v. MCQUARRIE.

Action against J. P.—Notice of action—Bona fides.

Held, that in an action against a Justice of the Peace, where no notice of action was given, the plaintiff was entitled to have submitted to the jury the question whether the defendant acted *bonâ fide*, with an honest belief in his right so to act, so as to entitle him to a notice of action under R. S. O., ch. 73.

Neil v. McMillan, 25 U. C. R. 490, followed.

TRESPASS and false imprisonment.

Plea, not guilty, by statute.

Issue.

At the trial at the last Summer Assizes at Toronto, before Galt, J., the plaintiff proved her arrest by a constable on a warrant signed by defendant, and her detention in custody

for some time. She was brought before the defendant, and at last, on an arrangement between her and one Ellis, the prosecutor, said to have been forced on her, she was liberated.

The information laid by Ellis before the defendant charged that the plaintiff "did on the 12th March, instant, trespass on his lot by removing saw logs, being lot No. 8," &c., and prayed defendant summarily to investigate, &c.

The warrant set out that the plaintiff had been charged on oath before defendant, a Justice of the Peace, that she did trespass on lot No. 31, &c., by removing saw logs.

The evidence disclosed no cause or reason for this proceeding. It was a dispute about the charges on some saw logs of the plaintiffs, left to be sawed at Ellis's saw mill, and which she went to remove, and he prevented her, and then went to the defendant.

At the close of the plaintiff's case it was objected that there was no notice of action. The plaintiff answered that it was a question for the jury whether the defendant acted in good faith, and desired such question to be submitted.

The learned Judge held that notice was necessary, and directed a nonsuit.

In Michaelmas Term last *Hodgins*, Q. C., obtained a rule *nisi* to set aside the nonsuit.

On February 6, 1879, *Osler* shewed cause, citing *Cummins v. Moore*, 37 U. C. R. 130; *Kirby v. Simpson*, 10 Ex. 358; *Bross v. Huber*, 18 U. C. R. 282; *Prestidge v. Woodman*, 1 B. & C. 12.

Hodgins, Q. C., contra. The cases shew that the learned Judge should have left the question as to the *bona fides* of the defendant to the jury, as asked at the trial. A justice of the peace is not entitled to notice of action merely because he believed *bonâ fide* he was acting in pursuance of the statute; there must be reasonable ground for his belief: *Cook v. Leonard*, 6 B. & C. 350; *Booth v. Clive*, 10 C. B. 827. Whether he acts *bonâ fide* or with colour of

reason, so as to entitle him to notice of action, are questions for the jury: *Hazeldine v. Grove*, 3 Q. B. 997; *Friel v. Ferguson*, 15 C. P. 584; *Neil v. McMillan*, 25 U. C. R. 485; *Arnold v. Hamel*, 9 Ex. 404; *Agnew v. Jobson*, 47 L. J. M. C. 67. Where there is no colour whatever for supposing that the act done is unauthorized, notice of action is not necessary: *Roberts v. Orchard*, 2 H. & C. 769; *Leete v. Hart*, L. R. 3 C. P. 322. On the evidence it appears that the act of the defendant was harsh, and was an attempt to use the provisions of the Petty Trespass Act to compel the plaintiff to settle a disputed debt.

March 8, 1879. HAGARTY, C. J.—The whole question that we have to decide is, whether the plaintiff was entitled to have the question of *bona fides* submitted to the jury.

Wedge v. Berckly, 6 A. & E. 666, was a case in which the defendant, as a magistrate, detained goods on suspicion of a felony having been committed. Want of notice was objected, and leave reserved to enter a nonsuit.

Lord Denman says: "If the plaintiff meant to say that the defendant acted in the execution of his office colourably, or to discharge an old grudge, or otherwise in bad faith, he should have required the learned Judge to put the question of *bona fides* to the jury, and if they had found against the defendant on that point, I should say that notice would not have been necessary."

Patteson, J., says: "The question of *bona fides* was not put to the jury; but if circumstances raise that question, there is no doubt that it is for the jury. * * * The statute protects a magistrate for any thing done 'in the execution of his office;' that is, where he acts *bonâ fide* with the intention to execute it. In general, it has not been put to the jury whether he acted *bonâ fide*, because that has been assumed; but the question is for them."

Coleridge, J., takes the same view.

Hazeldine v. Grove, 3 Q. B. 997, was an action against a magistrate for trespass, for detaining the plaintiff, who was

a witness on a charge before him. There was a nonsuit for want of notice, neither party asking to have any question as to *bona fides* put to the jury.

Lord Denman says: "The principle seems to be this, that when the magistrate, with some colour of reason and *bonâ fide* believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally or exceed his jurisdiction. Whether he acts with such colour of reason and *bonâ fide* are questions for the jury under all the circumstances, if there be any evidence of them, and the plaintiff desires the opinion of the jury to be taken on them, though it is very common to submit them to the Judge first, as in the present case, on an application for a nonsuit."

In *Kirby v. Simpson*, 10 Ex. 358, the defendant was charged with acting maliciously, &c., as a magistrate, and produced an unquashed conviction legal on its face.

Parke, B., held that the Judge rightly nonsuited for want of notice. He expresses doubts whether it is for the Judge alone to decide if notice be necessary in all cases; but he is clear that where, as in the case before them, the plaintiff proceeded against the defendant solely in his character as a magistrate, that the notice of action was necessary, and the Judge could so decide. He says: "Whether the question of *bona fides*, in a case where it arises, is one for the Judge or for the jury, I think it unnecessary to give any opinion."

He expresses doubt whether the law of *Hazeldine v. Grove* now holds good "in actions against magistrates as such," and he doubts "whether these preliminary matters about notice, and so forth, are not properly for the determination of the Judge."

Arnold v. Hamel, 9 Ex. 407, decided in the preceding year, is commented on. That case was decided on the wording of statute 8 & 9 Vic. ch. 87, sec. 117 (Customs' Act.)

Parke, B., says: "This section is peculiarly worded. In general, in cases of this kind, it is a question for the jury

whether the defendant acted *bona fide* and under a reasonable belief that he was acting in pursuance of his office." At page 407 he says: "The language of this clause differs from the ordinary form, where notice of action is required for any thing done 'under the authority' or 'in pursuance of the Act.' The words in the Customs' Act were 'for any thing done in the execution of or by reason of his office.'"

He held in effect that the Judge must hear evidence on both sides as to whether the defendant was an officer of the Customs and acting by reason of his office, the question being did the defendant reasonably believe that his duty as such officer required him to act as he did, reasonable belief being an ingredient. It would then be for the Judge to decide.

Many of the cases are against individuals not filling any office, but protected by statute in certain cases.

Herman v. Seneschal, 13 C. B. N. S. 392, I merely cite to quote Sir William Erle's words at p. 399: "If the party is acting in a judicial office honest belief protects him, but where he fills no office he must not only *bona fide* believe, but he must act on reasonable grounds."

Booth v. Clive, 10 C. B. 835, does not discuss whether the question as to notice is for the Judge or the jury. It was an action against a county Judge for proceeding to arrest the plaintiff notwithstanding a prohibition had been issued. The Court say, "The true principle is, did the defendant try the cause honestly believing that his duty as Judge under the County Court Act called upon him to do so."

Most of the cases are commented on.

In *Selmes v. Judge*, L. R. 6 Q. B. 727, Blackburn, J., says, "I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute."

We have had several cases in our own Courts. *Bross v. Huber*, 18 U. C. R. 287, discusses this point.

Sir J. B. Robinson thought, with Parke, B., in *Kirby v.*

Simpson, where the act complained of was the formal act of making a conviction and issuing a warrant on it, and not the seizing or detaining a person by his individual act, without giving other evidence that he was acting as a magistrate, it is not a question for the jury whether defendant acted in good faith or not. Burns, J., took a similar view.

In *Friel v. Ferguson*, 15 C. P. 593, the point of *bona fides* was left to the jury.

In *Neil v. McMillan*, 25 U. C. R. 490, Draper, C. J., reviews the cases: "We apprehend the Judge will not assume that the defendant acted *malâ fide*, and in a case coming within the letter of the second section of the Act, for the protection of Justices, he would as a matter of law rule that the defendant was entitled to notice, but the plaintiff has the right to require that the question of *bona fides* should be submitted to the jury." He notices *Kirby v. Simpson*, and adds, "It is difficult to see upon what ground of reason or justice a magistrate who does a wrongful act, and who (as this jury have found) did not honestly believe he was acting at the time as a magistrate, can claim the protection which the Legislature intended for justices acting in the execution of their duty. Although there are *dicta* in some cases not wholly consistent with our conclusion, we have on full consideration adopted the opinion expressed by Lord Denman, that after the finding of the jury this defendant had no claim to notice of action."

There was, as here, an information on oath and a warrant issued by defendant as a magistrate, and a commitment by defendant which was clearly illegal, and at the trial Richards, C. J., left it to the jury that if they were satisfied that defendant issued the warrant of commitment in good faith, intending to act as a magistrate, to find in his favour.

Cummins v. Moore, 37 U. C. R. 130, seems to me to favour this mode of dealing with the case at the trial so far as its facts can be applied to the present case. Yet the defendant there is sued for maliciously arresting as a justice, as in *Kirby v. Simpson*. Our Court seems to consider that

if the case had been tried by a Judge alone he should have found for plaintiff, though no notice of action was given, and as there was a jury there was evidence proper to be left to them to shew the want of good faith in defendant.

In *Taylor* on Evidence, vol. i. p. 52, (1872), the question is disposed of in these terms: "In actions against magistrates for acts done in the execution of their office, the Judge must decide whether notice of action is necessary, and the question of *bona fides* must consequently be determined by him and not by the jury." For this he cites only *Kirby v. Simpson* and *Arnold v. Hamel*.

In *Cox v. Reid*, 13 Q. B., 560, Sir J. Patteson says, "It is not a question of reasonable or probable cause, so as to be within the decisions that the Court and not the jury was to decide, but a simple question of *bona fides*, so as to entitle the defendants to notice of action."

Mr. Hodgins has referred us to a case of *Agnew v. Jobson*, 47 L. J. 67, Magistrate Cases, tried at Durham Assizes, 1877, before Lopes, J. It was an action against a magistrate for ordering the plaintiff, who had been brought before him on a charge of concealment of birth, to be examined by a medical man. There was no notice of action. It was admitted that defendant had no right to make such an order, but that he had acted *bonâ fide* and in the belief that he had authority. There was a verdict for plaintiff and the learned Judge reserved his decision as to the notice. After argument by counsel on both sides he decided that no notice of action was necessary, that there was a total absence of any authority to do the act, and though he acted believing he had authority, there was nothing on which to ground the belief, no knowledge of any fact such as belief might be based on, citing several authorities which I have examined. It is not necessary for us to adopt Mr. Justice Lopes's ruling in its fullest extent.

Our statute for protection of justices seems to me to be identical in substance with the Imperial Act 11 & 12 Vic. ch. 44. Our sec. 16 and sec. 12 of the Imperial Act cannot be distinguished. But sec. 3 of the latter is as strong in

effect as to what takes place at trial as the later enactments.

On the whole, I have come to the conclusion that we should follow the law laid down in *Neil v. McMillan*.

I think the plaintiff was entitled to have it submitted to the jury whether the defendant acted in good faith, with an honest belief in his right to act as he did.

The learned Judge has not based his ruling as to notice on a finding by him as to the existence of such honest belief. Perhaps we may infer that he did so find, as he so ruled.

The only evidence adduced at the trial shewed a very singular line of conduct on the part of this magistrate.

In so holding I do not consider I am depriving justices of any substantial protection. We always have the power of interposing if we find jurors disregarding evidence on such a question as this. It is a very rare event to find a magistrate ever tendering amends—the principal object of the notice—nor can we fail to know that in this case notice had been given in fact, but failed from a technical defect.

If all the evidence on both sides had been taken it might, perhaps, have clearly appeared that there was no ground for the plaintiff's contention that the defendant did not act in good faith, honestly believing in his right so to do.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute.

BALLAGH v. ROYAL MUTUAL FIRE INSURANCE COMPANY.

Insurance—Statutory conditions—Variations—Reasonableness of condition—Non-payment of premium note falling due after loss.

Under the statutory conditions endorsed on a policy of insurance were printed in different coloured ink, but in the same sized type, the words prescribed by section 4 of ch. 162, R. S. O. Then followed, in much larger type, and in the same coloured ink, the words "additional conditions," and below this heading the following condition: "In case any promissory note for a cash premium, or for any payment or assessment on any premium note * * given to the company, or to any officer or agent, be not paid when due, the policy * * shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such note." The note in this case given for \$12, the first payment on the premium note, fell due on the 15th April, 1878, and the loss, exceeding the amount insured, \$500, took place on the 23rd March. This note was not paid, the plaintiff alleging that he omitted to pay, assuming the defendants would deduct it on settling the loss, which had not been adjusted.

Held, ARMOUR, J., dissenting, that the statute had been sufficiently complied with as to the additional condition, which was sufficiently indicated and set forth so as to be binding upon the assured.

Held also, ARMOUR, J., dissenting, that the condition was not an unreasonable one, and that the plaintiff could not recover, there being nothing in the evidence set out in the case sufficient to shew a waiver of the payment.

Per ARMOUR, J. 1. The condition was unjust and unreasonable, and especially under the circumstances of this case, with reference to which its validity must be determined. 2. The conduct of the defendants, as set out in the case, afforded a good equitable answer to the alleged forfeiture. 3. The note having been taken payable to the defendants' agent, not to defendants, and not such as defendants were authorized to take, there could be no forfeiture for its nonpayment without first presenting it at maturity and demanding payment.

DECLARATION on a policy of insurance made by defendants, dated the 12th day of February, 1878, whereby defendants, in consideration of the receipt of an undertaking for \$15.62, and a first payment thereon of \$12.50, insured the plaintiff to the amount of \$500 for one year, commencing on the 12th day of February, 1878, and ending at noon on the 12th day of February, 1879, as follows: \$100 on household furniture, &c., contained in the dwelling part of a frame building situate on south half of lot No. 289, south of River and east of Clinton streets, in the village of Teeswater; \$300 on stock of confectionery, cigars, and flour; \$100 on machinery used for manufacturing biscuits—

all contained in the confectionery part of said building. Averment of loss, &c.

Sixth plea. That the policy was made upon and subject to a condition thereon endorsed, that in case any promissory note for a cash premium, or for any payment or assessment, or any premium note or undertaking given to the defendants, or to any officer or agent thereof, should not be paid when due, the policy in connection with which such promissory note should have been given should be null and void, and the defendants should not be liable for any loss occurring *either before or after* the making of such promissory note: that the plaintiff duly gave^d his promissory note, bearing date the 12th day of February, 1878, for the sum of \$12, and payable two months after date, to defendants, for the first payment on the premium note or undertaking given to the defendants for the premium of insurance under the said policy, and the said promissory note remained in arrear and unpaid after the same became due, and was not paid either before or after the happening of the alleged loss, by reason whereof the said policy became null and void, and the defendants were not liable for the said alleged loss in the declaration mentioned.

Issue; and replication on equitable grounds. That after the said loss, and after the defendants had notice thereof, and up to the time the said promissory note matured, the defendants repeatedly advised the plaintiffs they would adjust the said loss, and thereby induced the plaintiff to believe that said loss would be immediately adjusted and paid, and the amount of said promissory note deducted from the insurance payable to the plaintiff for said loss: that the plaintiff, relying on the said promises of the defendants, neglected to pay the said promissory note at maturity; but within a reasonable time thereafter, finding the said defendants did not appear to adjust and pay the said loss, he offered and tendered to the defendants the amount of said note, who then for the first time repudiated their liability; and that under the circumstances, and at all events, the said condition in said sixth plea was not just and reasonable.

The case was tried at the last Fall Assizes at Walkerton, before Hagarty, C. J., without a jury.

At the trial the policy was put in, and endorsed thereon were the conditions prescribed by ch. 162, R. S. O., and under such conditions were printed in a different coloured ink, but not in larger type, the following words: "This policy is issued on the above statutory conditions, with the following variations and additions: These variations and additions are by virtue of the Ontario statute in that behalf in force, so far as by the Court or Judge before whom a question is tried, relating thereto, shall be held to be just and reasonable to be exacted by the company." Then followed, in the same coloured ink, variations to conditions 4, 9, 12, 16, 18, and 19; then the words, "Additional conditions," in much larger letters and in the same coloured ink as the variations; and below this heading was the following condition, being that set out in the sixth plea:—

"In case any promissory note for a cash premium, or for any payment or assessment on any premium note or undertaking given to the company, or to any officer or agent thereof, be not paid when due, the policy in connection with which such promissory note shall have been given shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note."

The fire which destroyed the property insured occurred on the 23rd day of March, 1878.

The plaintiff was called in support of his case, and swore: * * "I effected the insurance with Charles Weiser, the agent of the company at Walkerton. He gave me a receipt. I gave him fifty cents and his commission and a note for \$12. Mr. Weiser had been with me different times at Teeswater. He lives in Walkerton. He was in Teeswater asking me to insure, and I did not do it. I came on one occasion to Walkerton on business, and he met me in Mr. John Hour's hotel. He wanted to insure my premises. He had been at my place different times before that. I knew Mr. Weiser well. I had known him a good

many years. * * He comes to Teeswater about twice a month, and generally calls at my place when he comes. He had been often in my place before I insured it. I told him I would give him a small risk on it. I did give him a risk of \$500. I paid him the fifty cents and his fees, and gave him a note for \$12. I do not remember giving him any application. I did not calculate to insure when I came down, and had not the money with me. He said he would give me two months, and the company would notify me before the note matured. I guess Weiser was at my place after that before the fire. The fire happened on the 23rd March, 1878. I was not there. * * All my furniture was burned, with the exception of a bureau, a side-board, and a couple of beds saved at the time of the fire. The estimated value was about \$1,000. * * What was burnt was worth \$1,000. I lost \$1,000 or more by the fire. * * The confectionery and other things were worth between \$450 and \$500. The two machines alone were worth \$250. * * I telegraphed to Mr. Weiser after I went home: 'Shop burnt last night; only a trifle saved. Come at once.' He came on the following Monday; the 23rd was on Saturday. He said [his statements were objected to as not being evidence, and taken subject to such objection] he had sent word to the company. He went and saw the place. He stopped there the greater part of the day, and asked me all about my loss. I told him. He did not say anything about the note being paid or not being paid. He went away. He said the adjuster would be along. I telegraphed to Hamilton on the 4th of April: 'To the Royal Mutual Fire Insurance Company. Send your adjuster up here. I want to leave home.' I got an answer: 'Adjuster engaged in important case, which will detain him two or three weeks.' That was on the same day. On account of Mr. Weiser, I waited from the 23rd of March until the 4th of April. He told me he had been down to Hamilton and had seen the parties. Mr. Shannon sent some telegrams, and received some replies. * * I did not receive any telegrams after

the 4th of April. * * I never received notification of the note being due. Payment of the note was not demanded of me after the fire happened. I was advised not to pay the note; when the adjuster would come he would deduct it. Mr. Shannon advised me not to pay it. That is the reason I did not send it. Then, afterwards, I was advised to send it, and did so, and the company returned it. The letter returning the money is dated 13th May, 1878. That is all I have heard about the note. The company had never said a word to me about the note. Mr. Weiser did not the day after the fire ask me to make out my account. I was asked by the company. They wrote to Mr. Shaw, and said there was not a proper statement sent. That is the first I heard the company wanted any more. That would be some time after the first statement was sent. The letter was dated 1st of June, from defendants to Mr. Shaw, acting for the plaintiff. This was in reply to a letter from Messrs. Shaw & Robertson of the 20th May, 1878. (This letter was not put in, having been written, counsel said, without prejudice.) * * I did not receive my policy till after the fire. I was waiting for the adjuster."

Cross-examination: * * "It would be after the note came due I spoke to Mr. Shannon. We were waiting for the adjuster to come along. That is the reason I had not paid the note. I got the policy the Monday after the fire. The fire occurred on Saturday morning. I did not read my policy. I can read. I did not look at the conditions on the back."

The plaintiff's application for insurance, dated 12th February, 1878, his promissory note of same date for \$12, payable two months after date, and the receipt given him by the agent, were put in at the trial, duly proved or admitted. The receipt, as far as material, was as follows: "Received from John Ballagh, a cash payment of \$12.50, being the premium for an insurance of \$500 upon property described in application dated February 12, 1878, for term of one year, subject to the approval of the board of direc-

tors and to the conditions expressed in said application, *and on the company's policies in use at this date.*"

The first statement and proof of loss were received by the defendants on the 13th May, 1878, at which time plaintiff sent them \$12. The defendants' secretary acknowledged the receipt by letter, as follows :—

"HAMILTON, Ont., 13th May, 1878.

"JOHN BALLAGH, Esq., Teeswater. *Re* Policy No. 478.

"DEAR SIR,—I am to-day in receipt of a letter from you without date, but enclosing \$12.00 (dollars). As your policy has long since become void for non-payment of premium, I cannot consent to receive it at this late date, and enclose you herein the amount contained in your said letter.

"Yours very truly,

"H. THEO. CRAWFORD, Secretary."

The letter of plaintiff referred to in the above was as follows :—

"To the Secretary of the ROYAL MUTUAL FIRE INSURANCE COMPANY, Hamilton.

"SIR,—The adjuster not having arrived as yet to settle my claim, and expecting him daily, I herewith enclose you the amount of my note with interest, also a sworn statement of my loss. Hoping you will kindly attend to my claim at your earliest convenience, and by acknowledging receipt of same you will oblige

"Yours truly,

JOHN BALLAGH.

"No. of policy, 478."

By post card, dated 12th of March, 1878, the plaintiff requested defendants to send the policy in the following terms :—

"I insured in the Royal Mutual, Hamilton, on February 12. I want to know if my application is accepted. If so, I want my policy, as I have given note. I want policy before I pay note. Answer by return mail."

In answer to this card, defendants' secretary sent the policy on the 14th March.

The learned Chief Justice found a verdict for the defendants on the sixth plea and the issue thereon.

November 19, 1878, *Robinson*, Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff.

February 11, 1879, *Bethune*, Q. C., shewed cause. The condition on the policy required the payment of the note, and on default avoided the policy and put an end to the insurance. The condition was reasonable, as it might be inconvenient, if not impossible, to carry on the business of the company, unless their notes were promptly paid.

Robinson, Q. C., contra. In the policy there is no heading except the one, "statutory conditions;" there is no heading denoting the variations, and the conditions therefore is ineffectual. It is moreover unreasonable, and should be so declared. When the note fell due the defendants owed the plaintiff the whole amount insured. It was natural for him to suppose it unnecessary therefore to pay them this trifling sum. Such a condition is calculated to mislead an insurer, and it is not required for the protection of the company, for the instances must be very rare, indeed, where a note falls due after and before settlement of a loss; so rare that they could not affect defendants' interest appreciably. The Mutual Insurance Act, R. S. O. ch. 161, sec. 48, shews what condition as to the non-payment of notes the Legislature thought reasonable, and it is very different from the present. He referred to *Lafone v. Smith*, 3 H. & N. 735; *Sly v. Ottawa Agricultural Ins. Co.*, 29 C. P. 28; *Morrow v. Waterloo Mutual Fire Ins. Co.* 39 U. C. R. 441; *Berry v. Columbian Ins. Co.*, 12 Grant 418. The reasonableness of the condition must be determined with reference to the particular circumstances under which it is sought to be applied: *Gregory v. West Midland R. W. Co.*, 2 H. & C. 944, 33 L. J. Ex. 157; *Hodges on Railways*, 596.

March 8, 1879. CAMERON, J.—It is quite clear the defendants' are entitled to succeed on the issue denying the truth of the sixth plea, as it is not in fact disputed that the plaintiff did not pay the premium note at maturity, and so the verdict of the learned Chief Justice should stand, unless the condition avoiding the policy on non-payment of the

note must be held to be unjust and unreasonable, or the defendants by their conduct led the plaintiff to believe, as alleged in the equitable replication, that the loss would be immediately adjusted and paid, and the amount of the note deducted therefrom.

On the first point we can gain very little assistance from authority, as the statute under which the question is presented is recent, and it is not founded upon any English precedent. The counsel for the plaintiff, in his very clear argument, referred us to the authorities under the English Carriers' Act, where conditions were held to be unreasonable; but from the fact that the subject is so very different, and the common law obligations of the carrier so very onerous, that by the nature of his business he is bound to carry goods, and is virtually an insurer of them, unless his extreme liability is lessened by conditions held by a Court to be just in view of the limitation they may make in that common law obligation and duty, these authorities can help but little in guiding the Court to a proper conclusion in the present case.

It was also contended that the provision in sec. 48 of ch. 161, R. S. O. furnishes a guide to what would be reasonable in the present case. This section provides, "If the assessment on the premium note or undertaking upon any policy is not paid within thirty days after the day on which the said assessment has become due, the policy of insurance for which such assessment has been made shall be null and void as respects all claim for losses occurring during the time of such non-payment; but the said policy shall be revived when such assessment has been paid, unless the secretary gives notice to the contrary to the assessed party in the manner in this act provided; but nothing shall relieve the assessed party from his liability to pay such assessment or any subsequent assessments, nor shall such assured party be entitled to recover the amount of any loss or damage which happens to property insured under such policy while such assessment remains due and unpaid, unless the board of directors in their discretion decide otherwise," the argument

being, as the legislature did not think fit to make the non-payment of a subsequent assessment a ground for invalidating a claim for a loss occurring before such assessment, it is unreasonable to provide that the non-payment at maturity of a note given for or in place of a cash premium, should invalidate a claim for a loss arising though not payable before the maturity of the note. The note in question was taken under the authority of sec. 46 of ch. 161, R. S. O., which provides, "The directors may demand a part or first payment of the premium note or undertaking at the time that application for insurance is made; and such first payment may be in cash or by promissory note, and may be credited upon said premium note or undertaking, or against future assessments." It cannot be regarded in any manner as a premium note, but simply as a note in place of the cash payment required to be made at the time of the application; and the provisions of the act respecting premium notes and assessments thereon, the time of payment whereof is not known to the assured until he is notified, can form no rule or guide in determining whether it is reasonable to hold him bound by a condition, or rather whether the condition itself is reasonable, which declares "Unless you perform the obligation you have entered into according to its terms, you shall not have any benefit from the contract."

Under the 16th statutory condition endorsed on the policy the loss shall not be payable until thirty days after the completion of the proofs unless otherwise provided by the statute or the agreement of the parties; and by sec. 56 of the act ch. 161, R. S. O., the loss shall be payable in three months after the receipt by the company of the proof of loss.

The loss was on the 23rd of March. The note became due on the 12th of April, so that it was due sometime before the earliest possible period at which the loss became payable, whether the condition of the policy or the above clause of the statute is to govern. The money to pay losses with must be obtained by the company either by assessment on the premium notes, or from the cash in hand or to be derived

from payment of the notes given for cash payments on premium notes; and if all parties insured on the cash payment system sustaining loss were permitted to say, we will not pay because the company can deduct out of the sum that will be payable at a future period, where would the money come from out of which the company could pay?

The counsel, in arguing, said it was a very unlikely thing that many cases of loss would arise during the currency of the cash payment notes. This may be so; but it is a matter of speculation or conjecture, and it does not appear to me that the Court is at liberty to guess at what might or might not be probable in this respect in determining whether this condition is reasonable or just or the reverse. I cannot see anything unreasonable in it. The plaintiff undertook to pay \$12 at a particular time as a part of his premium, and the defendants told him by the contract they entered into with him upon the faith of that undertaking, if you do not pay you shall derive no benefit from the contract. Would it be reasonable to provide simply, if the note be not paid at maturity the policy should be void, or just to say to the assured if the property was burned down the day after such maturity, you did not pay and therefore you have no claim, when the company might sue upon the note or deduct it from the amount payable under the policy? I do not think any one would say such a condition would be unreasonable, and does it become unreasonable by providing that the same result shall follow, the avoiding of the policy, if the loss occurred before the time of payment? The power to deduct or recover on the note would be the same in one case as the other. The cash payment was not required to meet the demand of the plaintiff alone, but to help to meet demands of others as well upon the company, and I do not see what possible injustice there can be in providing that he should not be at liberty to say, "By reason of my later maturing claim it is not necessary for me to contribute what I have agreed to do towards the claims of others and thereby assist to enable you to perform your obligations towards them."

The Legislature has permitted condition number seven on the policy, which is: "The company is not liable for loss if there is any prior insurance in another company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing signed by a duly authorized agent." This condition under some circumstances would be most just and reasonable, under others it would be most unjust if considered simply as to what effect the further insurance would have in inducing the company to accept or decline the risk. Assume a property worth \$10,000 insured for \$1000, and without notice of this insurance another insurance is effected for \$500. No one would say the former insurance could have any weight in estimating the prudence of accepting the second risk, or that the policy would not be avoided thereby. The non-payment of the premium is regarded as a meritorious ground of defence: *Walker v. The Provincial Ins. Co.*, 8 Grant 217, in Appeal; and no condition providing that its non-payment should avoid the policy should or can be properly considered unjust or unreasonable.

The plaintiff in this case, taking his own account of the matter, was not anxious to insure with the defendants. He yielded to the frequent requests of the agent, Mr. Weiser, and would probably not have effected the insurance had not the indulgence been extended to him of giving him the two months' time to pay the cash part of the premium. It is not, therefore, doing an injustice to him in holding him to the terms of his undertaking, and leaving him just where he would have been had he not effected the insurance at all.

It remains to be considered whether, under the equitable replication and the evidence offered in support of it, the defendants should be prevented from taking advantage of the plaintiff's failure to pay the premium at the stipulated time. The reasons why they should be so prevented, as stated in the replication, are, that after the loss and up to the time the note matured the defendants repeatedly

advised the plaintiff they would adjust the loss, and thereby induced the plaintiff to believe said loss would be immediately adjusted and paid, and the amount of the note deducted from the insurance money payable to the plaintiff. The only evidence to support this is that of the plaintiff himself, and it falls far short of establishing that the defendants frequently advised the plaintiff they would adjust the loss, if that would be sufficient to relieve the plaintiff from his default.

The only communication that took place between the plaintiff and the defendants, or any one having authority from them to act for them in the matter, before the maturity of the note, was the plaintiff's telegram of the 4th April, eight days before the note matured, requesting defendants to send their adjuster, and their reply that the adjuster was engaged in an important case which would detain him two or three weeks.

Assuming that the agent Weiser could bind the defendants, according to the evidence he does not appear to have done anything to help the plaintiff's contention. He was not called, and all the plaintiff says about him is: "He said he had sent word to the company—that is, to inform them that the loss had happened. He went and saw the place. He stopped there the greater part of the day, and asked me all about my loss. He did not say anything about the note being paid or not being paid. He went away. He said the adjuster would be along. * * On account of Mr. Weiser, I waited from the 23rd March until the 4th April. He told me he had been down to Hamilton and had seen the parties." Now, this does not shew that defendants advised him they would adjust the loss.

By the statutory condition 12, endorsed on the policy, the plaintiff was required forthwith to give notice of his loss, and to deliver as soon afterwards as practicable as particular an account of the loss as the nature of the case would permit; and it was, under sec. 56 of the Act already referred to, the duty of the board of directors, on receipt of the notice and proof of loss, to ascertain and determine the

amount of loss. The plaintiff did not furnish these proofs till about the 13th of May, when he sent the amount of the note and statement of claim. The money sent was immediately returned and liability repudiated.

By statutory condition 19 on the policy, it is declared: "No condition of the policy, either in the whole or in part, shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing, signed by an agent of the company." Assuming, then, that Mr. Weiser was an agent that could bind the company, and that what the plaintiff alleges he said amounts to a promise to send an adjuster who would settle the amount, it does not waive the condition respecting the payment of the note.

I think, then, the plaintiff has failed to make out his equitable replication, and that the verdict should stand and the rule be discharged. I have not overlooked the objection, made on the argument of the rule for the first time, that the requirements of ch. 162 of the R. S. O., sec. 4, have not been sufficiently complied with, and therefore the policy must be considered as not having the additional conditions respecting the payment of the premium. That clause provides: "If a company desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect"—being the words above stated as following the statutory conditions and preceding the variations and additional conditions endorsed on the policy. The type in which this notice is contained is not in size more conspicuous than the type used in printing the conditions, but the colour of the ink is different, and from that circumstance is made conspicuous. The words "additional conditions," immediately preceding the condition in question, are in much larger type and quite conspicuous.

I am therefore of opinion the objection is not entitled to prevail, and that the additional condition is distinctly indicated and set forth so as to be binding on the insured.

In *Sly v. Ottawa Agricultural Insurance Co.*, 29 C. P. 28, the necessity of the prescribed statutory heading to

variations or additions to conditions was considered and determined, but as I understand the effect of that case it is not to declare that the words in the statute, "variations in conditions," should be used as a heading, but that the words, "This policy is issued on the above statutory conditions, with the following variations and additions: These variations (or additions or omissions according to the facts) are by virtue of the Ontario Statute in that behalf in force so far as by the Court or Judge, before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company," should appear at the head of the varied, or added or omitted conditions, and in this respect the present policy strictly complies with the requirements of the act, unless, as before stated, in addition to the conspicuousness given thereto by the decided change in the colour of the ink, as matter of law, the use of larger type is also necessary, and I do not think it is.

What the Legislature intended I presume is something that would readily attract the attention of the person reading the policy. Large letters or small letters are of no consequence to the man who cannot or will not read.

HAGARTY C. J.—I agree that our judgment should be for defendants.

The objection as to the heading of the conditions under the statute was not taken at the trial before me, but was raised for the first time in Term. It amounts to this, that the words "variations in conditions" are not printed at the head of the special conditions; otherwise the words required by the Act as a special heading, calling attention to the Ontario Act and to the power of the Judge or Court to decide on this being reasonable or not, are there printed in ink of a different colour, and quite apart from the statutory conditions; and the set of clauses of which the clause on which the defence is rested is the first, is specially headed "additional conditions" in very conspicuous type.

In *Sly v. Ottawa Agricultural Ins. Co.*, 29 C. P. 28, the Court held that the total omission of the prescribed head-

ing as to the varied conditions being subject to the opinion of the Court or Judge, was fatal. I retain that opinion, but I cannot extend it to this case. The omission here is far less in extent and wholly free from the objections there held valid.

It is here of the very narrowest technicality and I am not prepared to give way to it.

The language of the Appeal Judges in *Spice v. Bacon*, L. R. 2 Ex. Div. 463, shews that it was the materiality of the omitted word that forced the Court to hold that the statute was not complied with.

Our statute says "words to the following effect." I think the words used here are sufficiently "to the effect" to answer the enactment.

The verdict was allowed to pass on the evidence adduced without this objection being taken. As it is purely technical I am disinclined to entertain it now, although if then objected to it could not have been cured.

If there were no other objections to the verdict except this, no Court I think would grant a rule on such a point not previously taken.

On the substantial defence I am unable to pronounce such a condition, as to the non-payment of the note, to be unreasonable.

It was distinctly proved at the trial that it was all important to a company like the defendants to have the premiums paid at the appointed time, and that their means of meeting their losses depended thereon.

I look upon this condition as hardly in the nature of penalty or forfeiture.

The giving of time for payment of a cash premium is a substitution for requiring actual payment, and the note of the assured is taken as an equivalent.

Courts have held that the non-payment of the premium payable in cash was fatal to the plaintiff's recovery. It is not easy to see why the same result should not follow for its non-payment within the extended period of credit.

In *Johnson v. Provincial Ins. Co.*, 27 C. P. 469, the non-

payment of a note for the premium, taken by an agent without the defendants' knowledge, was considered to be fatal. At the foot of the note there was a printed memorandum, that in case the note was not paid at maturity the policy would become void, though the holder might proceed to collect the note. The insurance was not governed by the Uniform Conditions Act.

If it be reasonable to hold that an insurance is not complete until a stipulated cash premium is actually paid, I cannot see how it can be unreasonable to insist that it shall cease to exist if the premium be not paid at the expiration of the extended term of credit.

The plaintiff in this case, acting under unwise advice, intentionally omitted to pay the note. It is not a case of forgetfulness or accidental unintentional omission.

ARMOUR, J.—The defendants are a company incorporated under 36 Vic. ch. 44, R. S. O. ch. 161, an Act respecting mutual fire insurance companies, and their policy in this case purports to have been issued "in consideration of the receipt of an undertaking for \$15.62, and a first payment thereon of \$12.50." The undertaking referred to is, I presume, contained in the plaintiff's application, and is in these words: "In the event of the Royal Mutual Fire Insurance Company granting me a policy of insurance upon the property described in this application, or any part thereof, I hereby undertake and promise to pay to the said company, at its office in Hamilton, in addition to the part of the premium for such insurance to be paid in cash, such further sum or sums as the directors may from time to time deem necessary to meet the losses and expenses of the company, not exceeding in the whole a further sum equal to twenty-five per cent. of the part of the premium now paid by me in cash, and in the event of this insurance being renewed this undertaking is to continue in force during the time of such renewal."

The plaintiff paid, on effecting the insurance, to the agent fifty cents, and gave this promissory note:—

\$12.00.

February 12, 1878.

Two months after date I promise to pay to C. Weiser or bearer twelve dollars, at Hamilton. Value received.

JOHN BALLAGH.

Weiser was the agent who effected the insurance.

The policy has endorsed upon it the statutory conditions, with the heading "statutory conditions," as required by R. S. O. ch. 162, and although variations of, and additions to, the statutory conditions are endorsed upon the policy, the heading "variations in conditions" is not prefixed to them, and although the words "This policy is issued on the above statutory conditions, with the following additions, 'These variations and additions are by virtue of the Ontario Statute in that behalf in force so far as by the Court or Judge before whom a question is tried relating thereto they shall be held to be just and reasonable to be exacted by the company,'" are printed at the head of the variations and additions, and after the statutory provisions, in ink of a slightly different colour, yet they are so printed in precisely the same type as that in which the statutory provisions preceding them are printed. After the variations, and as a heading to the additions, is printed the words "additional conditions," but in much smaller type than the heading "statutory conditions." These variations and additions are printed in type of the same size as that in which the statutory conditions are printed, and the variations and additions, and the heading, "additional conditions," are all printed in ink of the same colour with the words, "This policy is issued," &c.

The added condition upon which the defence in this cause wholly rests, is: "In case any promissory note for a cash premium, or for any payment or assessment on any premium or undertaking given to the company, or to any officer or agent thereof, be not paid when due, the policy, in connection with which such promissory note shall have been given, shall be null and void, and the company shall not be liable for any loss occurring either before or after the making of such promissory notes."

The loss occurred on the 23rd March, 1878, and the note above set forth fell due on 15th April, 1878, and was not paid for reasons which I shall have to advert to hereafter.

I do not think the condition above set out is legal and binding upon the plaintiff for non-compliance with the statute R. S. O. ch. 162.

Sec. 4 of that statute provides that "If a company (or other insurer) desires to vary the said (statutory) conditions, or to omit any of them, or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect:—

"Variations in conditions. This policy is issued on the above statutory conditions, with the following variations and additions :

"These variations (or as the case may be) are by virtue of the Ontario statute in that behalf in force so far as by the Court or Judge, before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company."

And sec. 5 declares that "No such variation, addition, or omission shall, unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, be legal and binding on the insured ; and no question shall be considered as to whether any such variation, addition, or omission is under the circumstances just and reasonable ; but, on the contrary, the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions, or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid."

The words "variations in conditions" are not added to the statutory conditions on the policy in question, nor are any words to the like effect ; nor are the words contained in sec. 4 of the Act, commencing with "This policy" and ending with "company," added thereon in conspicuous type.

All type is not conspicuous type, and the very small type in which these words are printed on the policy cannot be called of itself conspicuous, nor can it be called conspicuous with reference to the type in which the conditions,

variations, and additions surrounding these words upon the policy are printed, for they are all printed in the same type.

Before the passing of the Act, R. S. O. ch. 162, insurance companies could endorse just such conditions as they pleased upon their policies, whether such conditions were reasonable or unreasonable, and some insurance companies carried their power in this respect to such an extent that they endorsed conditions upon their policies of such a character that no person insured could comply with them; and whether they would pay a just claim or not was a matter entirely at their option, for it could not be recovered if they resisted it.

Thereupon every person began to call upon the Legislature to interfere to put a stop to such injustice, and no one called so loudly as the Judges.

The Legislature, yielding to this very proper appeal made to them, passed this Act, entitling it "an Act to secure uniform conditions in policies of fire insurance," and provided that certain conditions therein set forth and called statutory conditions should be printed upon every policy, and gave the insurers power to vary, omit, or add to such conditions, but only in the mode prescribed by the Act.

It is only by enforcing a strict compliance with the mode as prescribed that the object of the Act can be effected.

The Legislature used the strongest language they could possibly use to enforce a strict compliance with the prescribed mode, and I see no reason why I should try to fritter away the plain provisions of their Act.

My position, as I understand it, is to enforce and uphold an Act of Parliament, not to gloss over or uphold evasions of it.

The principal legal objections that we have to contend with every day are those arising from Judge-made law, from different constructions being put upon acts of Parliament from what their plain words indicate.

What is said by Martin, B., in *Bowman v. Blyth*, 7 E. & B. 47, in Ex. Ch., is not inappropriate in this case: "I will only add," he says, "that though I do not question that in con-

struing acts language seemingly positive may sometimes be used as directory, yet such a construction is not to be lightly adopted, and never when, as in this case, it would really be to make a new law instead of that made by the Legislature."

That the provisions of the 4th and 5th sections of this Act should be strictly construed is, I think, abundantly clear upon principle and authority; and I need only refer to *Sly v. The Ottawa Agricultural Ins. Co.*, 29 C. P. 28, where the Chief Justice of that Court in speaking of these very sections says, "We think we must hold that the statute is imperative in its requirements as to these variations, and that the absence of the headings which are designed to call especial attention to the statute and to the necessity for the variations being reasonable, &c., in effect removes them from the policy."

It is suggested that the printing of the words "additional conditions," as a heading to the additional conditions on this policy, supplement the neglected requirements of the statute, but I do not understand how the doing of what is not required by the statute can be held to be a complying with what the statute does require.

I may add that I think the words "ink of a different colour" are to be read as meaning of a substantially different colour, and it may be found that juries will hold bluish-black not to be a substantially different colour from blackish-blue.

The next question to be determined is, assuming the condition in question to be legal and binding on the plaintiff, is it a just and reasonable condition; for if it is not, the statute declares that it shall be null and void.

Sec. 6 of the Act provides that "In case any policy is entered into or renewed, containing or including any condition other than or different from the conditions set forth in the schedule to this Act, if the said condition so contained or included is held by the Court or Judge, before whom a question relating thereto is tried, to be not just and reasonable, such condition shall be null and void."

In dealing with the question of what is a just and reasonable condition, it appears that it ought to be determined, not according to what may be just and reasonable generally, but according to what may be just and reasonable under the circumstances of each particular case : *Gregory v. West Midland R. W. Co.*, 2 H. & C. 944.

In determining, therefore, whether the condition relied upon is just and reasonable, we have to determine whether it is just and reasonable under the circumstances of this case, and that this is the way the Legislature intended it should be determined is manifest from the use of the words "under the circumstances" in the 5th section.

I think, also, that the onus of proving that the condition relied on was, under the circumstances of this case, just and reasonable, lay upon the defendants : *Peck v. North Staffordshire R. W. Co.*, 10 H. L. C. 571.

The particular part of this condition which is attacked, as not being just and reasonable, is that declaring that the company shall not be liable for any loss occurring *before* the maturity of the note.

I think this part of the condition not just and reasonable generally, and assuredly so under the circumstances of this case, and I fail to see any evidence in the case proving it to be just and reasonable.

The note given by the plaintiff was given as a part payment of the premium of insurance under R. S. O. ch. 161, sec. 4; and as the Legislature did not make sec. 48 of that statute applicable to a note so given, it seems to me that they did not intend that the non-payment of such a note at maturity should work any forfeiture.

By sec. 48 the insured is prevented from recovering a loss happening while he is in default, not a loss happening, as in this case, before he is in default; and this seems to me to shew that the Legislature did not deem it just and reasonable that he should be prevented from recovering a loss which happened before he was in default; at all events, it is strong evidence in support of this view.

It seems to me to be strong evidence against such a con-

dition being just and reasonable that it has never been used as a condition by any insurance company but the defendants, and it strikes me that it must be very unjust and very unreasonable or some other insurance company would have used it before this.

This insurance company is stated to have been only sixteen months in existence, and a witness who is called for the defendants, one Livingston by name, swears that he suggested this condition to this company, and that he was the true and first inventor of it.

Livingston was not an officer of this company, but was employed by them to adjust losses. He swore that prompt payment of notes taken was very important, but he gave no evidence from which the inference could be drawn that this condition was under the circumstances of this case just and reasonable.

To satisfy me that an invention is useful I should require some other evidence than that of the inventor, and to satisfy me that this condition is just and reasonable I would prefer to have other evidence than that of the inventor of it.

The secretary of the company, who was the only other witness called on behalf of the company, did not even pretend to give any evidence that this condition was just and reasonable under the circumstances of this case, or under any other circumstances, or that the prompt payment of this note was of any importance to this company.

The plaintiff still remains liable to the defendants for the note given and the undertaking entered into by him, and it is provided by sec. 51 that their proceeding to recover from him thereon shall not be a waiver of any forfeiture incurred by his non-payment.

The secretary swore that there never was any defence to the plaintiff's claim except the non-payment by him at maturity of this note ; so that when the fire occurred on the 23rd of March, and from that up to the 16th of April following, the defendants had no defence whatever to the plaintiff's claim. He naturally thought, as I confess I would

have thought myself, had I been in his place, that there was no necessity for him to pay the defendants \$12 when they owed him \$500, and that they would take credit for the \$12 when they paid him his loss.

Now what was the conduct of these defendants while they were lying in wait from the 23rd of March to the 16th of April for a defence to this suit?

During this time they were no doubt fervently praying that the plaintiff would make default in payment of the note. But they did something more. They were leading the plaintiff to believe that they intended to send their adjuster up to adjust his loss.

Weiser, their agent, had notified them of the loss on the 25th of March. He went to Hamilton and saw the defendants' secretary a few days afterwards, and he brought back word that the adjuster was coming up. The plaintiff being desirous of leaving home on the 11th of April, 1878, telegraphed the defendants, "When will adjuster be here; I want to leave home?" The answer came from defendants' secretary the same day, "Adjuster engaged on important case which will detain him two or three weeks."

They telegraphed to Weiser, their agent, not to act for the company in this matter, which raises a suspicion that they feared he would say something to the plaintiff about paying the note.

At the time Weiser took the note he told the plaintiff that the company would notify him before the note matured.

The secretary swore that the defendants did not write to make any claim for the note, but further on he swore: "I presume the accountant sent him the regular notice. I never enquired on that point. We have a regular printed form for advising parties that their notes are due on a certain date. The accountant invariably sends notices to all parties. I am not aware whether he did in this case. It is the custom of the office to notify them."

The plaintiff swears that he never received any notice, and it is fair to presume that none was sent.

This is also a suspicious circumstance. When the plain-

tiff found that the adjuster did not come, he was advised to send to the defendants proofs of his loss and the amount of his note, and did so. The latter they refused to receive, and returned it to him.

The defendants never sent the adjuster to adjust the plaintiff's loss, for that which they hoped for occurred, and their secretary then wrote to the plaintiff's solicitor, calling his attention to the condition, and stating that the plaintiff by not paying the note had treated his part of the contract with supreme indifference, and that the company felt it would be unjust to the other policy-holders of the company to tax them for the plaintiff's loss.

Under all the circumstances of this case, it is impossible for me to conclude that this condition is just and reasonable—that the plaintiff, by the non-payment of \$12 which he owed to the defendants, should forfeit \$500 which they owed him.

If this condition is just and reasonable, my imagination is not equal to the conception of one that would be unjust and unreasonable.

I am of opinion, also, that the conduct of the defendants affords a good equitable answer to the alleged forfeiture.

Assuming, further, that the condition in question is legal and binding on the plaintiff, and is just and reasonable, I hold that no forfeiture could be worked by the non-payment of this note without presenting it to the plaintiff on the day it fell due and demanding payment of it.

It is not such a note as the defendants were authorized to take. They can only take notes payable to themselves in their corporate name, and such notes cannot be made negotiable notes.

For the non-payment of such a note as they are authorized to take a forfeiture might be worked without such presentation and demand; but can a forfeiture be worked by the mere non-payment without presentation and demand of such a note as that given in this case, payable generally and transferable by delivery, and which when it matured might have been in the hands of a holder unknown to the maker?

I am of opinion that if an insurance company such as the defendants choose to take such a note as they took in this case, and which they had no authority to take, they cannot under the condition in question forfeit the policy by the mere non-payment of such a note.

I think a verdict ought to be entered for the plaintiff for the amount of his claim less the amount of the note, and interest thereon from August 13, 1878.

I refer to *Gore District Mutual Ins. Co. v. Simons*, 13 U. C. R. 555; *Re Albert Life Ass. Co.*, L. R. 9 Eq. 703; *Maxwell* on Statutes, 330; *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *Harding v. Knowlson*, 7 U. C. R. 564; *Spice v. Bacon*, L. R. 2 Ex. D. 463; *Bross v. Huber*, 15 U. C. R. 625, 18 U. C. R. 282.

Rule discharged.

SOWDEN V. STANDARD INSURANCE COMPANY.

Insurance—Agent of Co. acting for insured—Misdescription of premises.

At the foot of an application for insurance on a block of five buildings under one roof, there was above the signature of the applicant an agreement, declaration and warranty, that if the agent of the Company filled up the application, he should in that case be the agent of the applicant and not that of the Company.

The plaintiff signed a printed form of application in blank, which he gave to the agent telling him to examine the buildings and fill it up. This the agent did from an examination and diagram of the buildings which he had made on a previous occasion; and in answer to the question, "Is there any other fact or circumstance affecting the risk with which it is necessary that the Company should be made acquainted?" he answered "No. It is a first class building in every respect: although one roof covers all, there is a solid brick fire wall between each store or building."

The defendants set this up, as a defence under the Statutory Condition, No 1. There was not, as a fact, such a wall, and the jury found that this was a misdescription and misstatement of a fact material to the risk.

Held, ARMOUR, J., dissenting, that the plaintiff could not recover.

Per ARMOUR, J., under the circumstances, set out in the report, the fact was not one in the view of the defendants which was material to the risk, nor was the misdescription to the prejudice of the Company.

DECLARATION on a fire policy, averring loss.

The 5th plea set out a statutable condition in the policy, "If any person shall insure his building and goods, and shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect to the property in regard to which the misrepresentation is made;" and then alleged that the plaintiff by his application caused the buildings to be described other than as they really were, to the prejudice of the defendants, by describing the same as a "first-class building in every respect: although one roof covers all, there is a solid brick fire wall between each store or building"; whereas there was not a solid brick fire wall between each store or building; such misdescription being a fact material to the risk, and to be made known to defendants to enable them to judge of the risk; and that the policy was therefore void.

The 6th plea set out the same statement as that contained in the application and negatived its truth.

An equitable replication was added at the trial, to the effect that one K., agent of defendants, applied to the plaintiff for a risk on the buildings, and plaintiff signed an application in blank on the understanding that the agent would examine the buildings, make measurements, and fill up the application correctly: that the plaintiff never saw the application after so signing it until after the loss, and save as aforesaid he made no representations, and had no knowledge thereof.

Demurrer, issue, and rejoinder. That by the terms of the contract which plaintiff signed, it was expressly agreed by plaintiff that if the agent of the company filled up the application, he should in that case be the agent of the applicant, and that the survey in all cases was to be signed by the applicant, and in no case by the agent of the company effecting the insurance.

The trial took place at the last Spring Assizes, at Peterborough, before Harrison, C. J., and a jury.

The property insured was in the village of Millbrook, on a block of buildings under one roof, five tenements, one intended for a hotel at the west end, and the others for stores, and they were called Nos. 1, 2, 3, 4, & 5. \$1,000 on No. 1, the hotel, and \$500 on each of the others. \$3000 in all. They were at the time in course of construction.

Mr. Kirkhoffer was the local agent, and did apply to plaintiff for the risk. The plaintiff signed a printed form of application produced by the agent, and gave it to him to be filled up, telling him to examine the buildings and make his own measurement and description. The buildings were not then completed.

The brick division walls went to the first floor between the stores. Between the west building, called the hotel, and the store No. 2 there was a brick wall up to the roof plate; and so between the east building, No. 5, intended for a bank, and the store No. 4, it went to the roof.

The first floor of each of the stores, 2, 3, & 4, were in-

tended to be a part of the hotel, consisting of two doors and a hall. Between the east building (the bank) and the next store there was an opening intended for a water closet.

The agent stated that he drew the diagram on this application from a diagram he had made in a previous insurance which he had taken as agent; that he was under the impression when he drew it that the walls would be run up to the roof. He considered the risk as on one building, and if insured as separate buildings it was material that there should be solid walls between the buildings, as it sometimes affected the rate. He made no personal inspection on the occasion of this risk, but had inspected it on a former occasion. He stated that had he known the walls were not continued to the roof he would have represented the fact to defendants. He added that even with such knowledge he would not have charged any additional rate.

An insurance agent called for the defence stated, that a wall with openings, unless protected by iron doors, would not be a "fire wall." Others said that fire walls were most material, and without them the rate should have been much higher.

The defendants' secretary said he had no special recollection of this application on which the policy was granted.

In the application (as already noticed) the property appeared described as in separate tenements.

In the answers to the questions to No. 4: "Building, when built? Is it stone, brick, or wood? What size? How many storys high?" Answer: "This year; not quite finished yet. The block is 70 x 96; three storys high. No. 1 is to be a hotel, when completed; the remainder stores. The roof is felt and gravel."

In answer to No. 12: "Is there any other fact or circumstance affecting the risk with which it is necessary that the company should be made acquainted?" Answer: "No. It is a first-class building in every respect. Although one roof covers all, there is a solid brick fire-wall between each store or building."

The following diagram shews the block :—

No. 1. To be a Hotel.	No. 2.	No. 3.	No. 4.	No. 5.
	This	part one	Story.	

At the foot of the application was printed, above the signature of the applicant :—

“It is hereby expressly agreed, declared and warranted, that each and every of the answers as above made is true and that the same, and this application and survey, and the diagram of the premises herewith, shall be part of the insurance contract and policy hereby applied for, and shall be held to form the basis of the liabilities of the said company; and that if the agent of the company fill up the application, he will in that case be the agent of the applicant, and not the agent of the company.”

No material fact was in dispute at the trial. The agent and the plaintiff agreed in their evidence. It was quite clear that the plaintiff left it wholly to the agent to fill up the application, and that the latter made this unfortunate mistake. He and the plaintiff seemed to have acted in good faith.

There was some discussion at the trial as to the meaning of “solid” applied to a brick wall. The learned Chief Justice told the jury that the word “solid,” used in the connection as in the application, would appear to call for a wall without holes through or by means of which fire might be communicated; but he still left the matter to the jury, with the following questions, to which their answers appear :—

1. Did the plaintiff, by his application for the insurance, represent that although one roof covered all, there was a solid brick fire-wall between each store or building? Answer. Yes.

2. Was there a solid brick fire-wall at the time of the application between each store or building of the buildings insured? Answer. No.

3. Was the misdescription, if any, a misdescription of a fact material to the risk? Answer. Yes.

4. Did the plaintiff, by his application, erroneously and untruly represent that there was a solid brick fire-wall between each store or building? Answer. Yes.

5. Was the erroneous and untrue statement, if any, last mentioned, a statement of a fact material to the risk? Answer. Yes.

He held that the plaintiff was bound by the statement in the application given to the agent to be filled up.

He found the equitable replication for the plaintiff, and the rejoinder thereto for defendants.

It was agreed that the amount, if any, plaintiff could recover would be \$3,090.

It was urged that the provision, as to the agent being agent for the plaintiff, was in the nature of a condition, and if so, it was a question whether it was a reasonable condition, and should be endorsed as a variation on the policy.

A verdict was entered for defendants.

In Easter term last *H. Cameron*, Q. C., obtained a rule nisi for a new trial, on the ground of misdirection, in ruling that plaintiff was responsible for the manner in which the agent of the Company filled up the application signed in blank by plaintiff; and that although the risks on the two end buildings, as to which there was no misrepresentation were separate risks from those on the centre buildings, as to which the misrepresentation was alleged, plaintiff could not recover any part of the insurance on any of the buildings; and on the ground that the clause in the application, made a part and condition of the policy, that the agent of the Company filling up the application was the agent of the applicant and not of the Company, if it became a condition, should under the Statute have been

endorsed on the policy, and its reasonableness should have been determined by the Judge; and that in the absence of any such condition there was no evidence of any representation by plaintiff; and that there was no representation that there was a solid brick fire wall between each building according to the meaning of that term, as proved by the evidence of defendants, inasmuch as the representation proved was that one roof covered all the building; also on the law and evidence.

In Michaelmas term, *Bethune*, Q. C., shewed cause. This case is distinguishable from *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282, because there the agent knew the blacksmith's shop was there; here the agent did not know about the walls. The condition cannot be struck out as unreasonable, for the Legislature made the application part of the contract. He referred to *Billington v. Provincial Ins. Co.*, 2 App. R. 158; *Shannon v. Hastings Mutual Ins. Co.*, 2 App. R. 81; *Chatillon v. Canada Mutual Fire Ins. Co.*, 27 C. P. 458; *Bleakley v. Niagara District Ins. Co.*, 16 Grant 198.

H. Cameron, Q. C., contra. All at the foot of the application is a condition; and the Court should stamp the condition as an unreasonable condition. He cited *Williams v. Canada Farmers Mutual Ins. Co.*, 27 C. P. 119.

March 8, 1879. HAGARTY, C. J.—I think the objection based on the Ontario Statute cannot prevail. An Insurance company very naturally attaches great weight to the terms of the application, as it is the basis of the proposed contract, and on the information it contains must naturally depend their acceptance or rejection of the risk. They have a clear right to stipulate for a fair, intelligible description of the property, and to object to any misdescription or misstatement prejudicial to their means of forming a just judgment.

They claim the right to hold the applicant to the correctness of the statements, and we are not prepared to find fault with their notice to him, that if he either trusts or requests

their agent to fill up the application, that for such purposes he must be considered his agent, or, in substance, that by whomsoever drawn or filled up, the application must be binding on the applicant and free from material misstatement.

This preliminary requirement seems in no way to be opposed to the spirit or the letter of the statute. It is rather in accord with its professed object.

This case is free from many difficulties which have been presented by others, as to how a material mistake was made in the application. There is sometimes a direct contradiction between the agent and applicant as to what took place. Sometimes the latter is illiterate or stupid, and fails to understand the questions or to convey his meaning by clear statement, and a Board of Directors at a distance, who have otherwise no means of deciding in accepting or declining the risk, may fairly insist on having a statement which they may confidently adopt as binding on the applicant.

Here there is no contradiction whatever. The plaintiff chose to leave everything to the agent; gave him his name in blank; and the agent committed this most unfortunate mistake as to the nature of the risk. I think the applicant must be bound by it.

As to the materiality of it and the findings of the jury, the plaintiff cannot complain of the manner in which the questions were submitted to them; and I am unable to say that the jury formed a wrong conclusion.

It was argued that there was no question asked as to fire walls; but in answer to the twelfth or general question, this undoubtedly erroneous statement was made. It may have been unnecessary to have made it, but as it was made, it was, I think, clearly calculated to influence the judgment of the company in accepting the risk.

It was also urged that on the agent's evidence the rate was not thereby less than it otherwise would have been. I cannot accept this as decisive of the non-materiality of the misstatement.

There is a good deal more to be considered than the

mere fixing of a higher or lower rate, in deciding on a proposed risk, and we cannot dissent from the finding of the jury, that there was an erroneous and untrue representation as to a fact material to the risk.

It is one of the most unfortunate cases that has ever been argued before us, and we should gladly hear that the defendants have not insisted on their extreme legal rights in depriving the plaintiff of all benefit from a large insurance, which he seems in perfect good faith to have believed he had effected, and which we are compelled to hold void from their own agent's unfortunate mistake.

ARMOUR, J.—The questions put to the jury by the learned Chief Justice who tried this cause, purport to have been put under the fifth, sixth, and seventh pleas, but only those relating to the fifth plea have been brought under our notice, with the answers made to them by the jury, and it is upon the fifth plea alone, as I take it, that our decision of this case must rest.

The condition pleaded by the fifth plea is endorsed upon the policy sued on in these words: "If any person or persons shall insure his, her, or their building or goods, and shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they undertake, such insurance shall be of no force in regard to the property in regard to which the misrepresentation is made."

In support of the plea was put in the application for insurance made by the plaintiff, in which was contained the following question: "Is there any other fact or circumstance affecting the risk with which it is necessary that the company should be made acquainted." Opposite to which was written "No. It is a first-class building in every respect. Although one roof covers all, there is a solid brick fire-wall between each store or building."

The defendants also called witnesses who proved that in

the view of the companies they represented, whether fire-walls existed or not was material to be known.

Two questions seem to me to present themselves for determination under this plea, and the evidence in support of it.

1st. Was the statement, "Although one roof covers all, there is a solid brick fire-wall between each store or building," a misdescription to the prejudice of the company?

2nd. Or was it a misrepresentation of a circumstance material to be made known to the company, to enable them to judge of the risk they undertook?

If either of these questions must be answered in the affirmative, the plaintiff fails to recover. If both must be answered in the negative, he ought to succeed.

Neither of these questions, nor any questions to the like effect, were put to the jury, and I think that without a finding upon these questions, it is impossible to uphold the verdict, and that there ought to be a new trial in order that these questions should be found by a jury.

It is to be observed that the statement complained of was not made in answer to a question put by the company. The question to which it is alleged to be an answer, was asked with regard to any other fact or circumstance *prejudicially*, not *beneficially*, affecting the risk, and was completely answered by the word "No." The additional words were not properly responsive to the question, but irrelevant and altogether outside what was required by the company to be made known, and they must be dealt with as a representation by themselves without reference to the question put.

Now, whether this statement was material or not is not to be determined by the view that may be taken of it generally, or that may be taken of it by particular insurance companies or insurers, but by the view that was taken by the defendants themselves in carrying on their business of insurers, as to the materiality to them of the fact whether a building had fire-walls or not; and it seems to me quite clear upon the evidence that the defendants themselves, in

carrying on their business of insurers, did not look upon the fact of there being or not being fire-walls as at all material for their consideration in judging of the risks they undertook.

In their classification of buildings for the purpose of insurance, no distinction is made between those with fire-walls and those without, nor are fire-walls referred to at all.

In their tariff of rates no difference of rate is made in favour of a building with fire-walls as distinguished from one without, nor are fire-walls at all mentioned or referred to in their rate-book, and it is proved that no higher rate than was charged would have been charged had the representation in the case in hand not been made. In the printed application, furnished by the defendants to the insured, no question is asked as to whether there are fire-walls or not, nor is any question asked tending to elicit that fact.

Then was this statement viewed by the defendants as material in the case in hand? Certainly not, for it clearly appeared that in judging of the risk they undertook, they did not rely upon this statement at all.

The secretary of the defendants, whose duty it was to judge of the risks the defendants undertook, swore that part of his duty was to examine the applications and see that the proper rates were charged, and that he had no particular recollection of the application in question. He did not pretend to say that he or the defendants in any way relied on or took any notice of the statement complained of in judging of the risk in question.

How then can it be said that the fact was one material to be known to the defendants in order to enable them to judge of the risk they undertook?

If either the secretary, or any one else for the defendants, had looked at the statement complained of, it would have been seen that there could be no fire walls, for that was impossible with one roof covering all the buildings.

If, as I find, the fact^r of whether fire walls existed or not was not a fact, under^r the circumstances of this case, mate-

rial to be made known to the defendants in judging of this risk, it follows that there was no misdescription to the prejudice of the defendants.

I think that both the questions I have been considering ought, under the circumstances of this case, to be answered in the negative ; but whether I am right in this or not, the plaintiff had certainly a right to have had both these questions submitted to the jury, and without a finding upon them the verdict in this cause should not be allowed to stand.

I think, also, that the agent was not the agent of the plaintiff in writing the alleged answer to the question, but the agent of the defendants.

CAMERON, J., concurred with HAGARTY, C. J.

Rule discharged.

SUPERIOR SAVINGS AND LOAN SOCIETY V. LUCAS.

Mortgagor and mortgagee—Reformation of mortgage—Absence of redemise clause—Ejectment.

Defendant applied to plaintiffs, a money lending company, after being shewn their loan tables, on a form of application provided by the plaintiffs, for a loan of \$2,000, payable in twenty years, by quarterly payments, according to the plaintiffs' scale of re-payments. This scale shewed the quarterly payment required to re-pay \$1,000 in twenty years to be \$26.85, or \$53.70 for \$2,000, the sum required by defendant. The loan tables had this notice printed on them: "The loan table is for the inspection of all, rendering borrowers free from the possibility of extortion, deception or fraud, the loan being made at a fixed uniform rate." The application was submitted to the loan committee of the plaintiffs' board of directors and passed, it not being shewn or appearing that the committee was aware of any change from the loan table. A mortgage was afterwards prepared under the directions of the plaintiffs' manager, and signed by defendant, wherein the quarterly payment was stated to be \$57.60 instead of \$53.70, and the plaintiffs' manager swore that he told defendant the quarterly payment would be \$57.60 when he applied for the loan. This the defendant denied. The mortgage contained no redemise clause. Defendant paid the first quarterly instalment, stating that he thought the amount too much. The second he got a member of the plaintiffs' company to pay for him, telling him, as he said, of the mistake. This person being indebted to defendant, paid the full amount. When the third payment matured, defendant tendered to plaintiffs the correct amount, after crediting himself with the overpayments on the first two instalments. This the plaintiffs refused to accept and brought ejectment, claiming a right to possession of the land mortgaged, both by reason of the default in payment of the third instalment, and because there was no redemise clause; so that, default or no default, they were entitled to immediate possession. Defendant pleaded the foregoing facts, by way of equitable defence, and prayed that the mortgage might be made to conform to the true agreement: *Held*, HAGARTY, C. J., dissenting, that the loan table and defendant's written application referring thereto, accepted by plaintiffs' loan committee, constituted the agreement between the parties, and that the mortgage, notwithstanding the manager's statement that he had told the defendant the amount of the quarterly payment as stated in the mortgage, did not correctly set forth the true agreement, and therefore the defendant was entitled to have it reformed; and that rectification, and not rescission, was the proper remedy.

Held, also, that notwithstanding the omission of the redemise clause, it sufficiently appeared from the provisions of the mortgage itself and the rules and regulations of the plaintiffs' company that it was the intention of the parties that the defendant should retain possession until default, and the plaintiffs should, therefore, be enjoined from disturbing the defendant's possession until such default.

EJECTMENT.

The plaintiffs' notice of title was under a mortgage from the defendant, and by the breach of the covenants therein contained on the part of the defendant.

The defendant appeared and pleaded equitably, in substance, that defendant applied to the plaintiffs for a loan of \$2,000 on the premises in question, to be repaid in eighty quarterly instalments; and plaintiffs thereupon handed him a printed paper or table containing the terms on which they would make the loan, according to which paper the defendant would have to pay for each \$1,000 advanced \$26.85, quarterly, which would repay the loan in twenty years; and plaintiffs agreed to advance said \$2,000, so repayable in eighty quarterly payments of \$53.70 each, and the defendant agreed to accept the same; and thereupon the plaintiffs prepared a mortgage, &c., but instead of its being drawn in accordance with the loan so agreed and shewn in the printed paper, the defendants improperly prepared the mortgage so that the eighty quarterly payments were therein stated to be \$57.60 each, instead of \$53.70, and the defendant was informed by the plaintiffs and led and induced by them to believe that the mortgage was drawn in accordance with the terms so agreed on, and as stated in the printed paper, on the faith whereof he executed it: that it was so drawn erroneously and contrary to the intention and agreement of the parties: that he had paid the two quarterly payments that had become due, and tendered the third payment, and brought it into Court, and that there was therefore no default; and the defendant prayed that the mortgage might be reformed, &c., and that the plaintiffs might be enjoined, &c.

The case was tried at the last Fall Assizes at London, before Patterson, J. A., without a jury. Having reserved his decision the learned Judge afterwards found in favour of the defendant.

The facts and evidence are set out in the judgments of Cameron, J., and Hagarty, C. J.

In Michaelmas Term last, *W. W. Fitzgerald* obtained a rule *nisi* to enter a verdict for the plaintiffs on the grounds: I. That the evidence shewed that the defendant agreed to borrow from the plaintiffs \$2,000, upon the terms that the

defendants should give the plaintiffs a mortgage on certain lands securing the repayment of the said moneys and interest in quarterly payments of \$57.60 each quarter, for twenty years ; and the plaintiffs agreed to lend the money to the defendant on the said terms, such mortgage to be in a form to be approved of by the plaintiffs, and pursuant to such agreement the said loan was effected and mortgage given and executed by the defendant to the plaintiffs. 2. That no evidence was given sufficient to warrant this Court in reforming the said mortgage, the evidence of the defendant being at variance with the mortgage and unsupported, and being contradicted by the evidence of the plaintiffs' manager. 3. That the plaintiffs were, by the terms of the said mortgage, entitled to the possession of the lands notwithstanding no default had been made, there being no re-demise clause in the said mortgage entitling the defendant to the possession till default, and the evidence shewed that the defendant was in default.

On February 5, 1879, *Magee* (of London) shewed cause. The Court has power to reform on the equitable plea, and on the evidence a case is made out. There is a distinction between *Doe dem Roylance v. Lightfoot*, 8 M. & W. 563, and the present case, pointed out by Mr. Justice Patterson. There is an adverse authority referred to in *Doe dem Roylance v. Lightfoot*. The greater part of the chattel mortgage cases do not apply, as there were some special circumstances in nearly every case, upon which the judgment was based. The clause corresponding to sec. 14 of the Short Forms of Mortgage Act operates as a re-demise. Equity will restrain the plaintiff from taking possession until default.

Meek, contra. The learned Judge decided, contrary to the weight of evidence, and, it is submitted, took an erroneous view of the facts, as proved, in several important particulars. On the evidence the judgment should have been for the plaintiffs, as the evidence of the plaintiffs' manager is corroborated by the mortgage and by all other writings in the case, and the Judge made a mistake

in interpreting *Doe dem Roylance v. Lightfoot*, 8 M. & W. 563. The defendant is estopped from denying the validity and binding effect of the mortgage by having read and signed and sealed the same deliberately, and by having paid two payments without protest or objection. The evidence given is not such as to warrant the Court in reforming the mortgage. If a mistake has been made it must be *mutual* before the Court will act upon it: *Campbell v. Edwards*, 24 Grant 157; *Fowler v. Fowler*, 4 DeG. & J. 250. There is no instance known of a Court reforming a deed unless "mistake" is admitted by both parties or proven "mutual." Even if the Court should come to the conclusion that there is an equity established enabling the Court to *reform* the instrument, still the right of the plaintiffs to succeed in ejectment remains undisturbed: *Doe dem Roylance v. Lightfoot*, 8 M. & W. 563; *Doe dem. Paisley v. Day*, 2 Q. B. 147; *Porter v. Flintoft*, 6 C. P. 335; *Eccles v. Small*, 6 C. P. 479; *Ruttan v. Beamish*, 10 C. P. 90; *Watson v. Waltham*, 2 A. & E. 485; *Merchants' Bank v. Morrison*, 18 Grant 382; *Ford v. Jones*, 12 C. P. 358; *Doe dem. Mowat v. Smith*, 8 U. C. R. 139; *Tylee v. Hinton*, 42 U. C. R. 228; *Fisher on Mortgages*, 2nd ed., 464, 465; *Leith's Real Property Statutes*, 388, 389, 390; *Sheppard's Touchstone*, 272.

March 8th, 1879. CAMERON, J.—The plaintiffs are a corporation suing in ejectment to recover a piece of land, as mortgagees, under a mortgage made by the defendant to them to secure the repayment, in eighty quarterly instalments, of \$2,000 borrowed of the plaintiffs.

Three of the instalments have matured; two were paid, and the third remains unpaid by reason of a dispute between the defendant and the plaintiffs as to the correct amount of the instalments, the defendant alleging the true amount to be \$53.70 and the plaintiffs \$57.60. For non-payment of the third instalment, and by reason of there being no redemise clause in the mortgage, the plaintiffs seek to eject the defendant from the land.

The defendant alleges that when he made the first payment he objected to the amount, but thinking he may have made a mistake in his calculation, he paid according to the mortgage. The second payment was made for him by a member of the plaintiffs' board, to whom, he says, he represented the instalment was too much, but that this gentleman paid the amount claimed. When the third instalment became due, he tendered the correct amount, which the plaintiffs' manager refused to accept, and this ejectment was brought.

The defendant sets up, by way of equitable defence, in substance, that the true agreement between the parties was, as he alleges it, that the plaintiffs prepared the mortgage, and, by mistake or purposely, improperly inserted therein the larger amount as the true instalment payable by the defendant, and the defendant not noticing the error, and on the faith that the plaintiffs had filled up the mortgage for the correct amount, signed it: that he had tendered to the plaintiffs the true amount, which they had declined to receive; and he prays that the mortgage may be reformed.

The case was tried before Patterson, J. A., without a jury, at London, and he found the defendant's account of the agreement to be correct, and entered a verdict for him.

I think the verdict of the learned Judge was right, and should not be disturbed. I fully subscribe to and agree in the principle that where both parties have not been of one mind as to the terms of an agreement, a deed erroneously embodying it according to the view of one only of the parties cannot be reformed, because it is quite clear it is not the province of Courts of law or equity to make agreements for parties; and I agree with the language used by Strong, J., in *Campbell v. Edwards*, in the Court of Appeal, 24 Grant 170, where he says: "When it appears that the parties never concurrently assented to the same terms of contract, the Court will rescind an instrument which incorrectly purports to record an agreement which the parties never entered into; but to entitle a party to this relief of rescission it must appear that no agreement was, in

fact, ever arrived at; for if there was a contract, then the proper relief is not to rescind the instrument altogether, but to rectify it in such a way as to make it express the real meaning of those who executed it." Also, with the language of the same learned Judge, that "a party seeking rectification on the ground of mutual mistake must be able to shew by the clearest evidence, 'irrefragable evidence,' that neither of the parties intended the agreement to be such as the writing expresses it to be;" that is, in the actual agreement made by the parties before the instrument intended to give effect to it was prepared, and unchanged by them by communication with each other up to the time of executing the instrument alleged to contain the error. But if that language is to be held to mean that two parties may agree upon the terms of a contract, and then one of them, for his own purposes, shall to himself resolve to make a change in a term of the agreement, without which he mentally determines not to carry the contract into effect, and then prepares the formal instrument, embodying therein this change, without the consent of the other party, I cannot adopt it. I think in such a case the party making the change would be estopped from saying the instrument so changed contained the agreement as he intended it.

In the present case the plaintiffs, a loan society, represented to the defendant, by a printed circular or table, commonly used by them as embodying the terms on which they lend their money, as follows:—

"The published loan tables of the society are for the inspection of all, rendering borrowers free from the possibility of extortion, deception or fraud, the loans being made at a fixed uniform rate. * * The loan tables shew more liberal and favourable terms than have hitherto been given to borrowers by any similar society.

LOAN TABLES,

shewing monthly, quarterly, or half-yearly or yearly payments, required to redeem an advance of \$1,000 in the following periods:—

Number of Years.	2	4	5	6	8	10	12	15	20
Quarterly, payable at end of quarter.	137 86	74 96	62 50	54 25	44 01	38 03	34 12	30 36	26 85

They also presented to the defendant a form of application to be made by him for a loan. This application was signed by the defendant and presented to the board of directors of the plaintiffs, and contains the following among other terms: "I, Wm. J. Lucas, hereby offer the following freehold property" (here follows description of the property) "as security for two thousand dollars, to be advanced to me from the funds of the Superior Loan Society of London, Ontario, for twenty years, repayable quarter-yearly according to the said society's scale of repayments. * * I make this application subject to the conditions hereunder set forth." Among the conditions are the following: "Should the title be found unsatisfactory, or the security not be approved of after the valuation, or the applicant decline or omit to take up the amount applied for, or agreed to be taken by him, within one month after the amount is awarded, he shall be liable to pay all costs incurred by the society in respect of such application, and the directors may otherwise dispose of the amount so awarded. * * The society reserves to itself the right, at any time previous to the money being actually paid over to the applicant, to decline making the advance applied for. * * The borrower shall be subject to all the rules of the society in force at the time of his becoming a borrower, but not to any other rules." This application is signed by the defendant and witnessed by James Milne, the secretary and manager of the defendants' company.

It being conceded that at or before the signing of the above application, the defendant had delivered to him a copy of the company's loan tables, shewing, as above, that for the repayment of a loan of \$2,000, payable in twenty years by eighty quarterly payments, it would require only the sum of \$53.70, the defendant was entitled, if his application was accepted, unless very clear evidence was offered to shew that a different arrangement or agreement had in truth been made, to have had the mortgage prepared with the quarterly payments of \$53.70 inserted therein, instead of \$57.60. The mortgage was pre-

pared by the plaintiffs' solicitors, and the defendant swears he signed it upon the faith that it was drawn in accordance with the loan table, exhibit C., from which I have made the above extract. His evidence is: "I received paper C. from Mr. Milne, plaintiffs' manager. I looked over the paper to ascertain what the rates were, and made my application therefrom. Mr. Milne did not at the time speak of the quarterly payments, but he gave me the printed paper marked C. I then signed an application for the loan and afterwards executed the mortgage. In all probability I read the amount of the mortgage and of the quarterly payments. I did not compare the payments in the mortgage with the payments mentioned in exhibit C., as I took it for granted they were the same."

And the only other evidence at the trial, apart from the documentary evidence, was that of Mr. Milne, plaintiffs' manager. He said: "I remember defendant applying to me for a loan. He applied by application in writing upon our usual blank form. The application was signed 30th October, 1877. I know this date by reference to my book, it does not shew amount of instalments. I made the entry the same day I received the application. I cannot say how often he came about this loan: that may have been the first time. The society had printed loan tables, the printed copy now shewn to me, C., appears to be one of these tables. These tables do not apply to the defendant's loan. Similar circulars to these were in use by the society. I do not remember giving defendant the tables at the time of the loan. I may have done so. I may have given such tables sometime before the loan, but not on the day he made the application. I remember that fact positively by the application. Apart from the application I have a recollection I did not give him the tables on that day. Defendant came into the office on that day and said he wanted to borrow \$2,000. I then told him how much he would have to pay quarterly. I told him it was \$57.60. The formal application was then made. I drew it up and he signed it in my presence. In order to inform him what the payments would

be quarterly, I referred to a printed card or table similar to that now produced, marked D. I do not think our society had them printed. I got the card D. from the Agricultural Loan Society. Our society had not issued any similar cards or loan tables. We used D. in lending on city property generally, and sometimes on farm property. We generally use the table C. in lending on country property, and sometimes on city property. The rate on card C. is nine per cent., in D. ten per cent. * * After he left I entered the application in the application book, and marked the rate by endorsing in pencil, in the left-hand corner at top, the figures 10 per cent. I always mark applications in the same way when I tell borrowers the rate they have to pay. * * I wrote the pencil memorandum 10 per cent. at the time of the application, after he had gone, because *I had an idea the defendant might make difficulty*. The application is endorsed on the back with the following memoranda: 'Application No. 126. Proposal for \$2,000. W. J. Lucas, applicant, London Post Office. James Milne, valuator. Accepted for 20 years, \$2,000. 80½ yearly payments, \$57.60. Total amount, \$4,608. Insurance required for \$2,000. Agreed to lend \$2,000. Handed to solicitor 5th November, 1877. Laid before committee 2nd November, 1877. Passed. A. Keenlyside, President. R. S. Murray, Thomas Peel, John Brown.'

"Solicitors' Report. 'We certify that we have investigated the title of W. J. Lucas to the property within described, and that the same is good and sufficient, and that said W. J. Lucas and his wife have executed a mortgage to the society, with the usual covenants, for the sum of two thousand dollars, in accordance with the within proposal, and that the said mortgage has been duly registered.'"

With reference to the endorsement of the instalment, the secretary said: "I made the endorsement of quarterly payments in writing, about *the 1st of November*. * * *I did not mention to the defendant what the rate of interest was that he would have to pay when the loan was made. I did not tell him it would be different from the table C. I just*

mentioned to him the amount of the quarterly payments. I did not tell him I would charge more on city property, or on this class of loans, than on other loans. I submitted the application to the directors' board on the 2nd November. I do not remember that there was a discussion among the directors as to the rate to be charged for the loan. I cannot say whether there was such discussion or not. There may have been. *The figures 57.60 were endorsed on the application after the loan passed the board of directors, probably on the same day.* There are no minutes kept of the proceedings of the Loan Committee. I do not usually endorse on the application the particulars or amounts of payments before the loan passes the board. I am not sure whether the board passed any resolution stating the rate of interest at which loans would be effected, or adopting any particular scale of repayments. I am not aware that there are any minutes to that effect, or on that subject. The red book marked E is, I believe, one of the plaintiffs' prospectuses. It was issued two or three years ago. That is the only edition that has been issued. *We have not issued any other loan tables than the form C, nor any other edition similar to form C."*

In the *Petrolia Crude Oil Co. v. Englehart*, 29 C. P. 157, the facts were in many respects not dissimilar to those involved in the present case. The defendant there applied to the plaintiffs to purchase 10,000 barrels of crude petroleum oil for exportation, and the plaintiffs at a meeting of their board, at which the defendant was present, passed a resolution accepting the defendant's application, and that he was not to offer any refined oil for sale up to the 15th July, "provided the London Oil Refinery Company should make an arrangement with the plaintiffs, and continue their monopoly till that date," this proviso being added at the defendant's instance. An agreement under seal was afterwards drawn up and executed by the parties, omitting the above proviso. The omission was caused by the president of the plaintiffs' company giving to the solicitor positive instructions to omit it. The plaintiffs' president swore that

he would not have signed the instrument if it had contained the condition, and that he told the defendant the contract would have to be drawn absolutely. The defendant asserted that he was never told and never heard of any alteration or departure from the resolution, or that the proviso was to be omitted or the contract absolute: that when he executed it he glanced at the contract and ascertained the prices and quantities were correct; he saw it had been prepared by the solicitor, in whom he had confidence, and that he would not have signed had he known that the proviso had been omitted.

Notwithstanding this contradiction, the Court gave judgment that the instrument should be reformed by inserting the condition. Mr. Justice Gwynne said: "I am of opinion that the defendant's equitable plea is established, and that the condition which formed part of the actual contract between the plaintiffs and the defendant having been omitted from the sealed instrument executed by the defendant, and having been left out of that instrument by conduct which, in the eye of a Court of equity, was wrongful, should be inserted in that instrument, which should now be read as if it contained that condition."

The learned Chief Justice also said: "It is said Jenkins (the president of the company) told him (the defendant) after the resolution was passed, that the contract as to exporting must be absolute. He denies this, and there is no corroboration of Jenkins's statement to the contrary. Such a contradiction illustrates strongly the wisdom of the principle that calls on us to look at the written formal expression of the terms of the agreement between parties instead of loose verbal declarations and assumed qualifications asserted on one side and denied on the other."

Apply this language to the present case. The plaintiffs issue their circulars and their prospectuses, and their pass books, declaring "the published loan tables of the society are for the inspection of all, rendering borrowers free from the possibility of extortion, deception or fraud, *the loans being made at a fixed and uniform rate.* * * The loan

tables shew more liberal and favourable terms than have hitherto been given to borrowers by any other similar society." These loan tables shew that the amount payable quarterly for twenty years to repay a loan of \$1,000 is \$26.85. One of these circulars and tables is handed to the defendant. He then signed an application for a loan of \$2,000, repayable in twenty years, quarterly, according to the society's scale of repayments. This application, so framed, without anything appearing thereon to shew what the quarterly payments were to be, except "the society's scale of repayments," is submitted to the Loan Committee of the board of directors and passed. The agent or manager of the company then endorsed, after the loan had been so passed, on the back of the application the erroneous amount—that is, erroneous if the defendant's contention be right—and sent the application to the solicitor, who, assuming the calculation to be correct, prepared the mortgage accordingly, and after execution he reported, upon the back of the application, that the defendant and his wife had executed a mortgage for \$2,000 in accordance with the proposal.

This report is printed on the back of the application, with blanks to be filled in for names and amounts, shewing that the plaintiffs intended that in all ordinary cases the proposal of the applicant would be adopted.

If there had been no verbal or unwritten evidence as to the amount, could any one doubt the terms of the agreement were completely made out so far as the quarterly payments were concerned? The effect of this written evidence the plaintiffs seek to displace by the oral testimony of their manager, who admitted that he had, previous to the signing of the application, given to the defendant the loan tables, and had filled up for him the application in its present shape, and that the plaintiffs had not issued any other loan tables. He says, "I told defendant how much he would have to pay quarterly. I told him it was \$57.60." This the defendant positively denies. But assuming that he did so tell the defendant, taken in connection with this witness's further statement, "I did not mention to the

defendant what the rate of interest was that he would have to pay : I did not tell him it would be different from the table C. : I just mentioned to him the amount of the quarterly payments : I did not tell him I would charge more on city property or on this class of loans than on other loans,"—must it not be deemed that the defendant would regard it as the amount that, according to the loan tables, would be required to repay \$2,000 at the rate shewn by these tables would be payable on a loan of \$1,000 ?

Can it be supposed for a moment that, without any discussion on the subject or intimation of any kind, in the face of the declaration accompanying the tables, that they rendered borrowers free from the *possibility* of extortion, deception, or fraud, the loans being made at a fixed and uniform rate, the defendant could have it presented to his mind that these tables were being departed from, or that he was signing an application which, though it in terms referred to the society's scale of repayments, or, in other words, its loan tables, was not to have reference to these tables, but to the statement made by the plaintiffs' manager, that statement not being in accordance with these tables? It would be difficult without the defendant's denial to come to the conclusion upon Mr. Milne's testimony that either the plaintiffs' or defendant's understanding of the arrangement was, that the loan tables were to be departed from before the mortgage was signed.

If the board of directors or the loan committee were not informed of what the manager had said to the defendant, and the manager does not think he said anything to them about it when they passed the loan, clearly the mortgage does not contain the plaintiff's understanding of the agreement any more than it does the defendant's, and the case would be brought literally within the rule laid down by Mr. Justice Strong, in delivering the judgment of the Court of Appeal, in *Campbell v. Edwards*, "that a party seeking rectification on the ground of mutual mistake, must be able to shew, by the clearest evidence, 'irrefragable evidence,' that neither of the parties intended the agreement

to be such as the writing expresses it to be. It must also be shewn with equal clearness that there was another agreement assented to and concluded by both parties, which ought to be, by an amendment of the instrument, substituted for that which, in its unrectified form, it erroneously states." It is quite possible that the members of the governing body of these plaintiffs are up to the present time ignorant of the actual defence and contention of the defendant. All that has been brought to their notice is, probably, that the defendant was in arrear in his payments, and the manager in the ordinary course of his duty would communicate with the solicitor; for I can scarcely believe that a respectable body of men, managing an important loan association, would deliberately cause to be issued and circulated loan tables accompanied by a declaration that they give more favourable terms than other similar societies to borrowers, and declare these tables to be designed to protect the borrower from extortion, deception, and fraud, and then permit their manager, without specially calling the attention of the borrower to the fact, to depart from such tables, and in the face of the borrower's assertion that he had been deceived, and by the terms of his written application, passed by them, supported in his assertion, harrass him with an action when he has offered to perform his undertaking according to their own openly professed terms, and thereby practise the very wrongs they professed to guard him against.

By deciding in favour of the defendant, I do not think in this instance the Court will be doing what it must be conceded would be beyond its just province, making a contract for the parties which they did not intend to make. It will be observed, in this case, it is not alleged by the plaintiffs' manager that the loan would not have been made at the rate fixed by the loan tables, and in this respect it is therefore less strong against the party seeking rectification than was the evidence in *The Petrolia Crude Oil Co. v. Englehart*, where the president of the company positively swore that he would not have signed the con-

tract in the shape in which the defendant sought to have it put.

Upon the point that there was no redemise in the mortgage, I have no doubt whatever, both from the provisions in the mortgage itself, and from the rules and regulations of the society, it was the intention of both parties that the defendant should retain possession until default, and it would be most inequitable to permit a disturbance of the possession, there having been no default made by the defendant, if my view as to what was the true agreement between the parties is correct.

Upon payment of the amount in arrear on the instalments at \$53.70 each, the plaintiffs' rule for a new trial should be discharged, and the mortgage reformed by substituting \$53.70 in place of \$57.60, as the amount of the quarterly payments ; and the plaintiffs must pay costs.

I have not noticed in detail the several authorities cited in support of the plaintiffs' contention that the deed cannot be reformed, as there is no doubt about the principle on which Courts act in the reformation of deeds evidencing the agreement of parties.

I concede the necessity for very clear evidence of the error alleged to justify the alteration of a deed or writing, so as to remove that error and make the instrument what it is affirmed it ought and was intended by the parties it should be ; but the clearness must be estimated by its effect on the mind of the Judges or Judge who may have to decide upon it, and, the evidence not being rendered inadmissible by some well established rule, the Judge must decide according to the impression it makes upon his mind. To one that may be "irrefragable evidence" which to another would be far from convincing, and may be a reason why, from the fallibility of human judgment, the rule should prevail in equity as at law, not to permit a deed to be impeached by parol evidence. But as that is not the rule that prevails in equity, each case must depend upon its own particular circumstances and incidents, and as the evidence here convinces me that the agreement was as the

defendant asserts it to have been, I can arrive at no other conclusion than the one above set forth.

HAGARTY, C. J.—I agree that the defendant is entitled to some relief. The difficulty with me is, whether we can reform the mortgage as prayed.

This we cannot do, as I understand the law, unless we make it conform to some actual bargain made between the parties. If no bargain or contract was actually made by two assenting parties, one may be entitled to be released from the instrument which does not shew the true contract; but to reform it we must be able to see that a different bargain was really made.

When the defendant applied for the loan he may have been given the printed paper of rules (marked No. 2 at the trial), and he made his proposal in the printed application (marked No. 1), and that proposal is expressly based, "According to the said society's scale of repayments," and, the defendant may have throughout, and down to his execution of the mortgage, so understood it.

The question remains, whether the plaintiffs accepted the proposal and made the contract with the same understanding.

The manager, Milne, swears that on the 30th October the application was made. He will not deny his giving him at some time this table of rates, but swears it was not at the time of application, and that he told him that \$57.60 would be the quarterly payments, he (the manager) taking that rate from the tables of another company. He says he marked in pencil ten per cent. on the corner of the application.

On the 2nd November it was submitted to the Loan Committee and passed by them. No minute is produced as to this loan. He cannot remember that there was any discussion or not. Cannot say if the board had passed any resolution as to rate of interest, or adopting any particular scale of repayment.

They had published the red book produced two or three

years before, shewing rates as the defendant contends for. But he says the society had been in the habit of loaning on city property (as this was) on the higher rates of the other society.

On the back of the application is written, "Passed—A. Kinlyside, President," and the signature of three directors.

The manager says he did not fill up the blanks in the application, the amount of quarterly payments, \$57.60, till after it was so passed.

No director or other person present at the passing of the application was called.

The learned Judge says, "The contract was effected by the written proposal for the loan, and its acceptance by the directors. The error arose from the act of the secretary in instructing the solicitor to insert the larger amount in the mortgage." If this be a right conclusion of fact from the evidence, the verdict is undoubtedly right.

But was there a bargain made between the parties in the shape contended for by the defendant? Did the directors accept a proposal for the loan at the defendant's intended rate?

I have great difficulty in arriving at this conclusion. My strong impression is that the company passed the proposed loan at the rate fixed by Milne, their manager, viz., a quarterly repayment of \$57.60, not one of \$53.70.

If such a question were left to me as a juror I should find as I have just stated.

The suggestion of the defendant, that he was deceived or entrapped into executing the mortgage at the higher rate, does not, in my judgment, in any way help him in his endeavour to shew that the plaintiffs agreed on the lower rate.

If he desired to prove by clear testimony what passed at the board, or what the directors in fact "accepted," he should have called them. The burden of proof would, I think, be on him to shew that the deed he executed does not bind him, and that he really had made a different contract. He has, as it were, to remove his name and seal from the deed he executed.

Can we assume that the words in the application, "according to the society's scale of repayments," and the simple writing of "passed," with the signatures of president and directors, *per se*, makes a contract at the rate understood by him, and mentioned in a published table of the plaintiffs, whether the same rate was understood and agreed to by them or not?

The plaintiffs' case is, that the higher rate was what they agreed to.

If the matter had stopped there, the defendant's case would of course be far stronger; but he has to meet the difficulty of the terms of the mortgage executed afterwards by him, which plainly provides for the higher rate.

He excuses this and his subsequent payments at the higher rate on the suggestion that he thought he must have made some mistake in calculating the quarterly payment; but nothing could be simpler or more intelligible than the table of rates given to him, and on which he wrote, as he says, "\$53.70" in pencil, by adding together the two sums \$26.85, the quarterly payment on \$1000.

He is perfectly aware of the amount mentioned in the mortgage and paid at first accordingly.

Apart from the difficulty of compelling specific performance of an agreement to lend money, could defendant have compelled plaintiffs to complete what he calls the contract, evidenced by the form of his application and the president and loan committee writing "passed" upon it and signing it?

Such a demand, met by evidence, as here, that when so marked "passed" it was understood by them to be accepted at a higher and different rate, would, I think, undoubtedly fail.

Putting the worst construction on the mortgagees' conduct and evidence, is not the true conclusion to be drawn that the plaintiffs' loan committee never understood that they were agreeing to any rate but the higher rate at which they were in the habit of taking city property? Otherwise we would have to assume the fact to be that the loan com-

mittee did accept and pass defendant's proposal at the lower rate, and that it was altogether the manager's improper and wrongful procurement of a mortgage at the higher rate.

I am unable to accept this as the true conclusion on the facts.

Or, there is another possible result, that the loan committee passed the loan and were satisfied with the proposed property and the proposed borrower, leaving it to their manager to fix the rate of interest, as was customary on that class of property. It seems clear, in any view, that the manager never intended to loan the money at the lower rate.

Where the calculation of the true amount was so exceedingly simple, according to the printed table, it would be a bold and probably a most unsuccessful experiment intentionally to seek to entrap defendant into signing a mortgage with such a marked difference in the quarterly amounts.

Where there were so many as 80 payments a variation of over \$3 in each would hardly escape attention.

I am thus particular in dwelling on these matters, as I deem it all important to arrive at a correct conclusion of fact on the main question viz., Is there any contract or bargain in evidence to which we can make this mortgage conform?

The loan board on 2nd of November had the application and valuator's report. On 11th of December the solicitors certify as to the title, and that a mortgage had been executed dated 6th November. All these matters had to be attended to after the loan was passed. Registration was on the 16th November. We may presume the mortgage was either antedated or remained incomplete some days after the date, as on 26th November defendant gave an order for payment of \$900 to pay off one Nash, to clear the title. The defendant had a pass book which he produced, in which he is credited with the first two payments at the higher rate.

The law on the subject is very fully discussed and stated

in *Campbell v. Edwards*, in our Court of Appeal, 24 Grant 170.

Most of the authorities are noticed. Mr. Justice Strong delivers the judgment of the Court. He says, "When it appears that the parties have concurrently assented to the same terms of contract the Court will rescind an instrument which incorrectly purports to record an agreement which the parties never entered into. But to entitle a party to this relief of rescission it must appear that no agreement was in fact ever arrived at; for if there was a contract, then the proper relief is not to rescind the instrument altogether, but to rectify it in such a way as to make it express the real meaning of those who executed it * * A party seeking rectification on the ground of mutual mistake must be able to shew by the clearest evidence, 'irrefragable evidence,' to use Lord Thurlow's language, (see Lord Eldon's comment on this, 6 Ves. 32, *Townsend v. Stangrove*), that neither of the parties intended the agreement to be such as the writing expressed it to be. It must also be shewn with equal clearness that there was another agreement assented to and concluded by both parties which ought to be, by an amendment of the instrument, substituted for that which in its unrectified form it erroneously states. That the evidence establishing the mistake must be of the strongest kind before the Court will feel at liberty to alter a writing which the parties have authenticated by their signatures is, as might be expected, established by the highest authorities."

He quotes largely from Lord Chelmsford's judgment in *Fowler v. Fowler*, 4 DeG. & J. 264: "It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish in the clearest and most satisfactory manner that the alleged intention to which he desires it to be conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be liable to shew exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument

and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties, for whom the Court is virtually making a new agreement."

Tried by the tests here suggested the case before us would certainly seem to fail.

The learned Judge also notices a case of *McKenzie v. Coulson*, L. R. 8 Eq. 368, before James, V. C., where it was sought to reform a policy of insurance by means of a "slip" initiated by plaintiff's agent and the underwriters.

The Vice-Chancellor says, "Courts of Equity do not rectify contracts. They may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for the plaintiff to shew *that there was an actual concluded contract antecedent to the instrument which is sought to be rectified*, and that such contract is inaccurately represented in the instrument. It is impossible for this Court to rescind or alter a contract with reference to the terms of the negotiation that preceded it. The plaintiffs cannot escape from the obligation of the contract on the ground that they verbally informed the junior clerk of defendants' agent something different from what they afterwards in writing acceded to. Men must be careful if they wish to protect themselves, and it is not for this Court to relieve them from the consequences of their own concessions."

I may also refer to *Harris v. Pepperell* at the Rolls, L. R. 5 Eq., 1, and the authorities there referred to, and to *Mortimer v. Shorthall*, 2 Dru. & War. 372, before Sugden, C.

Had there been evidence of a bargain or contract actually made between the parties the case would have come within the decision of the Court of Common Pleas in the recent case of *Petrolia Co. v. Englehart*, 29 C. P. 157. There the Court held that there was clear evidence of the true contract between the parties by the resolution passed by plaintiffs' directors containing a term of the agreement afterwards omitted in the contract signed, and that defendant was entitled to have it reformed according to the true

contract of the parties. There the defendant put several of the directors in the witness box to prove that the company as such adopted the bargain as he proposed it.

I think, therefore, that defendant fails to shew any clear or concluded agreement or bargain between him and the plaintiff other than that contained in the mortgage which he seeks to reform.

There is no such "irrefragable" proof as is required by Lord Thurlow's judgment, as explained by Lord Eldon, and as all the cases and the text writers seem distinctly to declare to be required.

Where the defendant, according to his own shewing, made such an astonishing mistake in the amount of eighty quarterly payments stated in the mortgage, involving a difference of several hundred dollars against himself, I do not feel that we are bound to give implicit credit to all his statements in evidence, and refuse to believe what the manager so distinctly swears as his account and understanding of the dealing between them. I do not feel warranted in imputing false swearing to the latter, which I virtually do if I hold there was a concluded bargain on the terms sworn to by defendant.

I cannot give judgment in this case merely because the learned Judge finds that the contract was effected by its proposal and its acceptance. This, I think, is more a conclusion of law than of direct fact. Even assuming that he disbelieved the manager as to his statement, about telling defendant what the quarterly payment would be, I see no ground for holding that any actual bargain was ever made at the lower rate.

But on the whole, not without some hesitation, I am of opinion that he is entitled to be relieved from the contract, on such terms as a Court of Equity may impose, to restore the parties, as far as possible, to their original state: that it should be referred to the Master to take an account of what is due by defendant to plaintiffs on the sum of \$2000 advanced to him at legal interest, crediting him with all payments, and that on payment by him to plaintiff of the

amount found to be due within one month from date of report the plaintiffs do effectually release the premises from the said mortgage.

If such payment be not made then judgment to be entered in this suit for the plaintiffs, with costs of suit.

ARMOUR, J., agreed with CAMERON, J.

Rule discharged.

O'SULLIVAN V. VICTORIA RAILWAY COMPANY.

Master and servant—Common employment—Liability of employer.

Plaintiff, an employee of defendants, was sent by the foreman of the works to excavate earth from a bank below, while others were loosening it from above. While so engaged a quantity of earth fell down upon him, and broke his leg. *Held*, that defendants were not liable, and a nonsuit was ordered.

DECLARATION. That the defendants were possessed of a railway, and the plaintiff was employed by the defendants in excavating on the said railway, and in the course of his employment was working in a pit on said railway, and by the negligence of the defendants the said pit was in a dangerous state and unsafe for men to work in, which the defendants well knew, but of which the plaintiff was ignorant; and by reason of the premises, and also by reason, as the defendants well knew, of no proper or sufficient precautions being taken by the defendants to protect the plaintiff from injury in the said work, and while the plaintiff was, in the course of his employment, working in the said pit, a lot of stones and earth fell from the top and sides of the said pit on the plaintiff, and thereby the plaintiff was thrown down, his leg broken, and he was permanently injured, and incurred expense for medical attendance.

Pleas: 1. Not guilty by statute (R. S. O. ch. 165, secs. 1 to 103 inclusive, a Public Act; R. S. O. ch. 73, secs. 1 to 20 inclusive, a Public Act; R. S. O. ch. 1, secs. 1 to 10

inclusive, a Public Act.) 2. That the plaintiff was not in the course of his employment, as in the said declaration alleged, working in a pit on the said railway for the defendants. 3. That the plaintiff was not employed by the defendants in excavating on said railway.

Issue.

The case was tried before Gwynne, J., and a jury, at the last Fall Assizes, at Lindsay.

The facts were, that the plaintiff was a labouring man working on the line of defendants' railway. He and a gang of labourers, under a foreman or "walking boss," were excavating earth from a bank. They were working below, while others on top were loosening the earth with picks and driving irons in. While so employed a large quantity of earth fell down on the plaintiff, breaking his leg and injuring him very severely, so much so that he was disabled for many months, and incurred a surgeon's bill of over \$100.

One of the witnesses blamed the foreman as unskilful and incompetent for instructing men to work in the hole where plaintiff was working, and said that a competent man would not have put him in there to work. Plaintiff said he got no instructions from the foreman, but was only set to work, the foreman telling him to go in to work there.

The jury found that the defendants were guilty of negligence in sending plaintiff into an excavation of six feet projecting over his head without any support: that the top earth should have been broken off to not more than three feet of an overhang, and have been supported before the plaintiff was sent into the excavation: and they assessed damages at \$50.

Leave was reserved to move to enter a nonsuit, which the learned Judge (Gwynne) considered should be entered, but at the plaintiff's request he left the case to the jury.

19th November, 1878, *Barron* obtained a rule *nisi* to enter a nonsuit.

February 11, 1879. *Cameron*, Q. C., and *Martin*, shewed

cause. There was evidence that the foreman was incompetent. The cause of the fall was the blows from the top, and if caused as it was by the men above, it was negligence, particularly with the large overhang of earth there was, and under which the plaintiff was working. This overhang should have been reduced before the plaintiff was set to work beneath it. They cited *Scott v. London Docks Co.*, 3 H. & C. 596; *Hartwright v. Badham*, 11 Pr. 383.

J. K. Kerr, Q. C., and *Barron*, contra. There was not a tittle of evidence of the foreman's incompetency. The foreman was himself in the pit. The plaintiff knew that the men were at work above his head, and should have taken care of himself. If the accident was caused by the men working above, it was the negligence, if negligence at all, of a fellow servant, and so the defendants are not liable. They referred to *Smith's Master and Servant*, 3rd. ed., 197; *Wilson v. Merry*, L. R. 1 Sc. App. 326; *Swainson v. North Eastern R. W. Co.*, L. R. 3 Ex. D. 343; *Plant v. Grand Trunk R. W. Co.*, 27 U. C. R. 78.

8th March, 1879. HAGARTY, C. J.—In 1866, the case of *Deverill v. Grand Trunk Railway*, 25 U. C. 517, was decided in this Court and the authorities reviewed. An engineer was killed by a collision caused by the negligence of a switchman. It was held that there could be no recovery, the deceased and the switchman being fellow-servants in a common employment. It was attempted to charge the defendants on the ground that they had employed an incompetent switchman, but the evidence of incompetency was merely based on what took place at the accident.

The case on that point was much stronger than that before us.

Here the most that could be said was, that if the foreman erred it was merely an error in judgment, one that any man might make in such a case. It was not a work of any scientific nature or requiring any special knowledge or training; and there was no attempt whatever to shew

that his employers had any reason to doubt his fitness for his duty.

The general law is fully discussed in that case, and a very large number of authorities cited by counsel.

The wisdom of the general rule of non-liability of masters for injuries sustained by a servant by the neglect or default of a fellow-servant, is stated in *Farwell v. Boston and Worcester R. W. Corporation*, referred to in 3 McQueen's H. L. Cas. at p. 316.

Since then there have been other similar decisions.

Wilson v. Merry, L. R. 1 Sc. App. 326, very fully adopts and explains the rule, and points out that workmen do not cease to be fellow-labourers because they are not all equal in station or authority. Lord Cairns's judgment, at page 328, is very instructive.

Hall v. Johnson, 3 H. & C. 589, in Error, is much in point. The defendants were held not liable for the neglect of the "overlookers" in their mine for not properly securing or propping the roof, the plaintiff being injured by its falling.

Swainson v. North Eastern R. W. Co., L. R. 3 Ex. D. 343, cited by Mr. Kerr, seems the latest case, and fully recognizes the general rule.

In our own Court, we may notice *Plant v. Grand Trunk R. W. Co.*, 27 U. C. 78.

In the case before us, if the plaintiff were entitled to recover, such a verdict as \$50 would be unintelligible. We may cite the language of this Court in *Deverill's* case: "Very great compassion may be felt by the Court, as sincerely as by the jurors, for the sufferer by this accident: whatever jurors may feel at liberty to do, we at least must not allow this feeling to sanction what we believe to be a violation of a well settled legal principle."

ARMOUR and CAMERON, J.J., concurred.

Rule absolute.

IN RE CENTRE WELLINGTON ELECTION.

Parliamentary election—Recount of votes—41 Vic. ch. 6, sec. 14—Mandamus—Jurisdiction.

The Court refused a mandamus to the Junior Judge of the County of Wellington to proceed with the recount of votes under 14 Vic. ch. 6, sec. 14, D., as being a matter not within its jurisdiction, but belonging to Parliament alone.

In Michaelmas Term last *James Maclellan*, Q. C., obtained a rule *nisi* calling upon A. C. Chadwick, Esq., Junior Judge of the County Court of the County of Wellington, and George James Orton, Esq., to shew cause why a peremptory writ of mandamus should not issue, commanding said Judge to proceed with and complete a recount of the votes given at the election of a member to the House of Commons for the Centre Riding of the County of Wellington, on 17th September, 1878, pursuant to an order made by him on the 27th September, &c.

The facts appear to have been as follow:—

An election of a member for the House of Commons of Canada for the electoral district of the Centre Riding of the county of Wellington took place on the tenth and seventeenth days of the month of September last, when George Turner Orton and John Robinson were candidates, and John Peter MacMillan was returning officer. The nomination of candidates for the said election took place on the tenth, and the polling on the seventeenth day of September, as aforesaid.

On the twenty-third day of the said month of September said returning officer, at the time and place appointed in and by his proclamation, duly proceeded to add together the number of votes given for each candidate, in the manner prescribed by law, and on that day he made the final addition for the purpose of declaring the candidate elected, and there then appeared to be a majority of six votes in favour of the said George Turner Orton.

Afterwards, on the twenty-seventh day of the said month of September, application was made on behalf of the said

John Robinson to Austin Cooper Chadwick, Esq., Junior Judge of the said county of Wellington, in pursuance of, and in accordance with, section 14 of the Dominion Election Act of 1878, 41 Vic. ch. 6, for a re-count of the votes given at the said election.

On the same day the said Judge duly made an order under the said Act that he would, on Tuesday the first day of October then ensuing, re-count the votes given at the said election at the court house in the town of Guelph in the said county, at the hour of ten o'clock in the forenoon.

The said order was duly served upon the said returning officer, and upon the said George Turner Orton.

In pursuance of the said order, at the time and place named therein, the returning officer and his election clerk attended before the said Judge with the ballot boxes used at the election, and the said Judge then and there proceeded with the said re-count of votes in the presence of the said George Turner Orton and his counsel, and in presence of the counsel and solicitor of the said John Robinson.

After making some progress with the re-count, the said Judge adjourned the further proceedings thereon until the tenth day of October following, at the hour of ten o'clock in the forenoon, at the same place.

On the said tenth day of October proceedings were resumed pursuant to adjournment, as aforesaid, at the time and place named, and the re-count was proceeded with by the said Judge in the presence of the counsel for the said parties, and the votes given at the polling subdivisions numbers one, two, three, four, and five of the township of Peel in said electoral district were re-counted.

The said Judge corrected the ballot paper account and statement of the number of votes given for each candidate at two of the said polling places; and as to the others he reserved his decision upon one or two ballots to which objection had been made.

The ballot box of polling sub-division number six of the said township of Peel was then opened, and it was found there was therein a large envelope, endorsed in print "The

voters' list, list of voters and statement under section 57," and also endorsed in writing with the signature Edward McCann, deputy returning officer. There was also an envelope endorsed in print "The used ballot papers," and also an envelope endorsed in print "Rejected ballot papers." These envelopes were all sealed. There was also an open envelope containing certificates and affidavits, and among other papers a statement purporting to be under section 57 of the Election Act, saying, "Votes for Orton 69, votes for Robinson 67"; but this statement was unsigned.

These were all the envelopes found in this ballot box.

The Judge opened the large envelope first mentioned above, and found it to contain a mass of marked ballots, some marked for Orton, and others for Robinson.

The Judge also opened the envelope marked "Rejected ballots," and found it contained thirty-seven unmarked, and apparently unused, ballots.

The Judge opened no other envelopes.

The counsel for Mr. Orton then objected to the Judge counting the ballots found as aforesaid, and the counsel for Mr. Robinson requested him to count them.

After hearing the argument of the counsel on both sides, the learned Judge decided to refuse to count the said ballots, on the ground of their not being found in separate envelopes, and he did then and there, though requested by the counsel for Mr. Robinson, refuse to count the said ballots.

The counsel for Mr. Robinson then requested the said Judge to proceed to re-count the votes in the other ballot boxes which had not yet been opened, and of which there were twenty-three, but the said Judge then refused to proceed further with the said re-counting, and the same was accordingly not proceeded with.

The learned Judge also made a return in the matter, which is referred to in the judgment of the learned Chief Justice below.

February 13th, 1879. *McMichael*, Q. C., shewed cause. The statute clearly defines the officers to whom the duty is assigned. It is not the County Judge or the Junior Judge, but *the* County Judge. He referred to *United States v. Ferreira*, 13 How. 40. Then, this is not a case for a mandamus, which is only granted where there is no other adequate remedy: *High's* Extraordinary Legal Remedies, secs. 24, 98.

MacLennan, Q. C., supported the rule. It is clear that County Judge includes the Junior Judge. The technical name of the Senior Judge is not used, which is "the Judge of the County Court," &c. See Consol. Stat. U. C. ch. 15, sec. 4, and R. S. O. ch. 42, sec. 3, and subsequent sections. See also sec. 28 of the Interpretation Act of the Dominion. [THE CHIEF JUSTICE.—I think we are all agreed that the Junior Judge could act.] Then, the next point is, that the Judge ought to have gone on with the recount. He did recount five polls. He had difficulty about the sixth. He was requested to go on with the others, even if he could not go on with the sixth, but because he thought he could not recount the sixth, therefore he determined not to proceed at all. But there was really no difficulty in proceeding with No. six. The objection was that the ballots were found in one envelope instead of two. There was no question they were there, and could have been counted without difficulty. This was the merest childishness. The provisions as to the use of envelopes by the deputy returning officers are merely directory; a mistake or omission can vitiate nothing, nor hinder any impartial proceeding. Accordingly the returning officer is not to be stopped by the total want of box and ballots, and all for any one or more polls. In such case he is to do the best he can, and is to ascertain the result by evidence. The Judge is not to do that, but there is nothing to prevent him recounting the ballots which have been lost. He should count as far as he can, and if he finds any obstacle he can report that. [THE CHIEF JUSTICE.—I certainly saw no difficulty in the Junior Judge's way, and it seemed

ridiculous that upon such a flimsy excuse all these obstacles should have been thrown in the way of the parties. We should like to hear you on the question of jurisdiction, whether we can issue a mandamus in a case like this, relating to a Parliamentary election.] There can be no doubt of the general jurisdiction of the Court to compel by mandamus a public officer to discharge a duty cast upon him either by common law or by any statute: *Tapping on Mandamus*, 30; *Regina v. Bolton*, L. R. 5 Q. B. 251; *Mayor of Rochester v. The Queen*, El. Bl. & El. 1629. Counsel read several passages from the judgment of Martin, Baron, in the last case, shewing that the Court has power by mandamus to amend all errors which tend to the oppression of the subject, or other misgovernment, and it ought to be used when the law has provided no specific remedy, and justice and good government require that there ought to be a remedy for the execution of the common law or the provisions of a statute, and that the Court ought to be astute and eager to apply the remedy in all proper cases. The general principle there is, that the Court is to compel obedience to the law, whether it be by common law or by any statute. There is no exception. The duty must be performed. No case is found in which any one was so high above the law that he might refuse to do the duty imposed upon him when required by any one having an interest in its performance. The jurisdiction is for the purpose of giving a remedy to a person wronged, redress to a person aggrieved, and it can make no difference that the matter is parliamentary. Here the Legislature has given Mr. Robinson a right to have the ballots recounted. It has imposed the duty of recounting on this officer. He refuses. Why should he not be compelled? The suggestion is because it is a parliamentary matter—Parliament is so high and mighty it can send for this officer, and no one can tell what it may not do to him. It is true Parliament can do that, but it may not. Mr. Robinson cannot put it in motion. Its doors are not open, like those of a Court of Justice, for all who are aggrieved to enter. The action of Parliament

is no redress for Robinson, to whom the Legislature has expressly given the right of a recount. If we cannot have a mandamus then there is a right without remedy, a wrong without redress, contrary to the maxim "*ubi jus, ibi remedium*." This objection, that it is a parliamentary matter, was raised in the celebrated case, *Ashby v. White*, 1 Sm. L. C., 6th ed., 227, where all the Judges but Lord Holt gave effect to it, and refused redress. There judgment was, however, reserved, and Lord Holt's view sustained in the House of Lords. The same contention was made also in another celebrated case, *Stockdale v. Hansard*, 9 Ad. & El. 1, where it was held an action lay against the publisher of the proceedings of the House of Commons for a libel on the plaintiff, contained therein, though the publication was by order of the House. These cases shew that the fact that the matter is in some sense parliamentary, does not prevent the Courts of Justice from affording the proper redress to those who have been improperly deprived of their rights. It is no answer to say that Mr. Robinson could file an election petition. That is an expensive, cumbersome, tedious, remedy. That remedy existed before the Act of 1878, and this is a new right which the Legislature has given distinct from and in addition to the right of petition, and the question is whether, for insufficient reasons, or for no reason, that right may be absolutely refused, and the party aggrieved left entirely without redress. He cited the following additional cases: *Rex v. Norwich*, 1 B. & Ad. 310; *Rex v. Sparrow*, 2 Strange 1123; *Pickering v. James*, L. R. 8 C. P. 489.

8th March, 1879. HAGARTY, C.J.—The returning officer had declared that Mr. Orton had a majority of six votes. On behalf of Mr. Robinson, the other candidate, a recount was demanded under sec. 14 of the amending Act of 1878, 41 Vic. ch. 6, D.

The learned Judge made an appointment, and on 1st October was attended by the returning officer and election clerk, with the ballot boxes, and proceeded with the

recount. An adjournment took place, and on 10th October it was resumed.

On opening the ballot box for one of the polling subdivisions in Peel, it was found that the envelopes containing the ballots were irregularly arranged and indorsed, and one was open. The learned Judge, in consequence of these irregularities, declared that he could not proceed with the recount.

Application for a mandamus was made to me in Chambers, which I refused.*

* The following is the judgment of the learned Chief-Justice on the application in Chambers :—

26th October, 1878. HAGARTY, C. J.—A summons has been granted, calling on the Junior Judge of the county of Wellington and George T. Orton to shew cause why a mandamus should not issue, commanding the Judge to proceed with and complete a recount of the votes given at the late election for the Commons.

Cause has been shewn before me. It seems that some mistakes have been made in the putting up, sealing, and endorsing envelopes containing the ballot papers, &c., of sub-division six in the township of Peel, as directed by the statute, and the learned Judge is alleged to have declined proceeding with the recount in consequence thereof.

It is not suggested that all the ballots accepted, rejected, or spoiled have not been forwarded to the Judge, or not contained in the ballot box, but it seems clear that some of the envelopes were not properly sealed up, and were not endorsed as directed by the statute.

By sub-section 2 of section 14, 41 Vic. ch. 6, 1878, "The Judge shall proceed to recount all the votes or ballot papers returned by the several deputy returning officers, and shall, in presence of the parties, &c., &c., open the sealed packets containing (1) the used ballot papers which have been counted, (2) the rejected ballot papers, (3) the spoiled ballot papers, and no other ballot papers."

The duty of the deputy returning officer is pointed out in section 10 of the same Act: "All the ballot papers indicating the votes given for each candidate respectively, shall be put into separate envelopes or parcels, and those rejected, those spoiled and those unused, shall each be put into a different envelope or parcel, and all these parcels being endorsed, so as to indicate their contents, shall be put back into the ballot box."

The learned Judge has certified his proceedings under date of 3rd February, last, stating the irregularities, and his opinion that he could not proceed with the recount : that he was afterwards informed that the solicitors for

I gather from the affidavits that probably all these used, rejected and spoiled ballots are in envelopes in the ballot box, but not properly arranged or endorsed.

I am asked to issue a writ commanding the Judge to proceed with and complete the recount.

It is conceded that no precedent can be found for an interference by mandamus with any proceeding by officers entrusted with the execution and return of writs for the election of members of Parliament.

It is urged that the Court has the right to order the performance of any act commanded to be done of a public nature by any Act of Parliament ; but I hesitate to apply for the first time this principle to proceedings of this character.

Generally speaking, the House of Commons may be assumed to have the control over the execution of writs for the election of its members, and of enforcing returns thereto, and I presume that it can summon to its bar all persons answerable for the due execution thereof.

The Legislature has entrusted the trial of an election petition complaining of an undue return or undue election of a member, or of no return, or double return, or of any unlawful act by any candidate not returned, to the Courts of justice.

The words of this clause seem to warrant that a petition may be presented and be tried by the Courts, complaining that no return has been made, and in that view it might be urged that the House had delegated to the Judges the decision of the question whether a return to the writ of election had or had not been properly withheld.

I do not propose to decide this question ; nor do I propose, on my single authority, to hold that the writ of mandamus now asked can or cannot be awarded.

I think my proper course is, to leave it to the Court of Queen's Bench, in which Court the affidavits are entitled, to decide, with the weight properly attachable to a decision in Banc, whether we are to interpose by mandamus in this case or in the numerous cases that may arise as to any alleged omission, neglect, or refusal, to comply with any statutable direction in any Act of Parliament regulating the manner of executing the writs of election of representatives.

the parties had consented to proceed in the recount, waiving certain objections, and the Judge expressed his willingness to proceed : that about 2nd December, the counsel for Mr. Robinson asked for an appointment therefor, but Mr.

I think this is the proper course to take in a matter of such serious importance. The Term is not distant, and no practical inconvenience would arise from the delay.

As matters now stand, if the learned Judge refuse to proceed with the recount, or to take any action in the case, it is not easy to see how the returning officer is to make his return to the writ.

The ballots, &c., have been all handed over to the Judge, and by sub-section 4 he is, after the recount, to certify the result to the returning officer, who shall then declare to be elected the candidate having the highest number of votes, and (sub-section 5) he shall proceed to make his return.

For my own part, I hardly see the necessity for creating this temporary "dead-lock."

On the papers before me I do not see why the recount may not be proceeded with and completed on the materials in the ballot box. As I have already suggested, the probability is, that all the ballot papers, used, rejected, or spoiled, are there, however irregularly certified or endorsed. Of course, if they be not there, then the necessary material for the full recount may not be forthcoming, and no power seems to be given to the Judge to receive further evidence or material.

But, if on examination, there is no reason to assume that all the ballots are not there, the difficulty might be met by certifying, with the result of the recount, the state in which the ballots were found when examined by the Judge.

On receipt of the certificate, the returning officer (under section 61 of the Act of 1874), shall make "a report of his proceedings, in which report he shall make any observation he may think proper as to the state of the ballot boxes or ballot papers as received by him." This report could bring up all the points arising on this recount.

On a petition against the return of either candidate, all these alleged objections could, I presume, be discussed and settled.

I am not pronouncing any judgment or direction to either the learned Judge or the returning officer ; but, as I assume that these gentlemen equally desire to discharge their duty as fairly and legally as possible, I think it right to state how the matter strikes me on the materials before me.

Orton's counsel appeared and said that the consent had been withdrawn : that he (the Judge) thereupon said he could not proceed, and told them the nature of the report he should make : that he afterwards drew up and signed a report, which he delivered to the returning officer, and requested the latter to remove the ballot boxes. He refused to remove them, saying he wished to consider and obtain advice. The boxes still remain with the Judge.

The rule of this Court is dated 5th December.

The parties are placed in this difficulty, that under the Act the Judge is to certify the result of the recount to the returning officer, who is to declare the candidate having the highest number of votes to be elected, and is to delay his return to the Clerk of the Crown in Chancery until he receives a certificate from the Judge of the result of such recount.

When the first application was made to me in Chambers for a mandamus, I declined to interfere, pointing out the gravity of the proposed step, and its unprecedented character. Nothing that I have heard on the argument of this rule has removed from my mind the leading difficulty of the proposition sought to be established, viz., that the Court is asked to interpose its authority in the direction of proceedings which appear to belong altogether to another jurisdiction, which has always asserted with success its right to regulate the conduct and execution of writs for the election of its members.

I am satisfied that the legislation which has provided a new mode of trial of controverted elections, transferring such trial from the House to the Judiciary, has in no way affected the question now before us, and that we have to deal with it as if this important change had never taken place.

The House retains all powers that it has not expressly given up.

When a petition is presented for an undue return, or complaining of no return, it has to be decided by the Judges; and in the course of such enquiry the regularity

of proceedings, and the conduct of officials entrusted with the execution of the writs of election, may come in question, just as such matters might have been questioned before the election committee under the old system. But I fail altogether to see what power has been given to a Court of Law to interpose by mandamus or prohibition, so as to affect to regulate the proceedings of such officials in the execution of their duties under the election law.

If we can legally do what is asked here, we could with equal right affect to regulate the multitudinous duties prescribed to various persons in the conduct of the election, from the receipt of the writ by the returning officer till its return.

I think we have no such power.

The argument was based on the alleged general right of this Court to order any person to perform a clearly defined statutable duty.

It is generally asserted that such a course is not taken where there is any other adequate remedy.

The main objection seems to be this, that the person against whom the writ is asked is, as it were, the officer of another jurisdiction, which can exercise control over him, if necessary, and to whom, and not to us, he is amenable.

I assume, as I said in my former judgment, that the House of Commons has the power of enforcing returns to the writs issued for the election of their members. They have the right to enquire why any one or more constituencies may be unrepresented.

The special power given to the Judiciary is to try a petition complaining of an undue return, or of no return, or double return, or of any unlawful act by any candidate not returned : 37 Vic. ch. 10, sec. 7, D.

Sec. 65 prescribes what may be done on a petition complaining of no return: "And such order may be made by the Court or Judge, as it may deem expedient, for compelling a return to be made." This is explicit in the case of a petition; but the existence of a petition seems to be the essential foundation for judicial authority.

Sec. 12 of the Act of 1878, amending sec. 66 of the Act of 1874 (37 Vic. ch. 9, D.), allows the Court or Judge to allow an inspection of ballot papers in the custody of the Clerk of the Crown in Chancery, for the purpose of a prosecution for an offence in relation to ballot papers, or for the purpose of a petition filed questioning an election or return.

Sec. 106 of 37 Vic. ch. 9, D., declares that if any returning officer wilfully delays, neglects, or refuses duly to return any person who ought to be returned, such person, after his right to have been returned has been determined on the hearing of an election petition, may recover a penalty of \$500 and full costs against the returning officer.

Sec. 108: Any returning officer, deputy returning officer, election clerk, or poll clerk, who refuses or neglects to perform any obligation or formality required of him by the Act, shall forfeit \$200.

The Act of 1878, 41 Vic. ch. 6, sec. 14, D., provides for the recount before the County Judge, and directs him how to proceed.

The learned counsel who argued this case declared their inability to produce any authority for this application. We have not succeeded in finding any.

At different periods the Legislature has provided statutable remedies for injuries sustained by wrongful proceedings in the conduct of elections, but no interference has been permitted by the Courts in the management of the election or the execution of the writ.

23 Henry VI. ch. 14, gives an action for a penalty of £100 against the party aggrieved by a false return or no return.

7 & 8 Wm. III. ch. 7 (made perpetual by 12 Anne), and 25 Geo. III. ch. 84, bear on the same question.

The famous discussion in *Ashby v. White* (see Sm. L. C., 6th ed. vol. 1, page 227), seems to range over the whole field of the Law of Parliament. The distinction seems very clear between an individual seeking to vindicate in the Courts his right to exercise his franchise and that of an interfer-

ence by the Courts in the conduct of officers in the execution of the writ of election, or the return thereof.

Onslow's Case, 3 Lev. 39, was an action on the case against a returning officer for not returning the plaintiff having the majority: Held, by all the Court, not to lie: except on statute 23 Henry VI. no action could be brought, the principal part being a return in Parliament.

Barnardiston v. Soame, 6 Howell, 1063, was an action on the case for making a double return, the plaintiff having the majority. The very elaborate judgment of North, C. J., discusses the whole question. It is held, in effect, that except so far as statute law has given jurisdiction to the Courts, the whole matter is for Parliament. He says, "It is admitted that Parliament is the only proper judicature to determine the right of election, and to censure the behaviour of the sheriff."

In his *Parliamentary Practice*, 7th ed., p. 51, Sir Erskine May says, "Another important power peculiar to the Commons is that of determining all matters touching the election of their own members. This right has been regularly claimed and exercised since the reign of Queen Elizabeth, and probably in earlier times, although such matters had been ordinarily determined in Chancery. Their exclusive right to determine the legality of returns, and the conduct of returning officers in making them, was fully recognized in *Barnardiston v. Soame*, by the Court of Exchequer Chamber, in 1674, by the House of Lords, 1689, and also by the Courts in *Onslow's Case*, 1680, and *Prideaux v. Morris*, in 1702, 2 Salk. 509."

25 Geo. III., ch. 84, makes various provisions respecting elections. Section 10 provides for the case of returns to the writ not being duly made, that a Select Committee may be appointed, and the returning officers called on, &c. Section 14 gives an action with double damages against returning officers for wilfully delaying or neglecting to make returns, but the matter had first to be adjudicated upon by the Select Committee.

The general subject is discussed in *Hallam's Constitu-*

tional History, ch. 5, p. 269: "The Commons asserted in this reign (Elizabeth), perhaps for the first time, another and most important privilege, the right of determining all matters relative to their own elections."

An account is given of the proceedings in the Norfolk Election, in 1586. The Chancellor had issued a second writ for this county on the ground of some irregularity in the first return. The House resolved, "That though they thought very reverently of the Lord Chancellors and Judges, and knew them to be competent Judges in their places, yet in this case they took them not for Judges in Parliament in this House, and therefore," &c.

On the whole, I am satisfied that there is no jurisdiction in this Court to interfere in the manner proposed; that the right to deal with all such matters belongs to the House of Commons, except so far only as the Legislature has expressly devolved on the Courts certain express duties and powers respecting elections, and this proposed interposition by mandamus is not one of those so devolved.

In this view it is unnecessary to discuss the question raised by the defendants as to the right of the Junior Judge to make the recount.

For myself, I remain of the opinion expressed by me when the first application was made, viz., that he had such power.

We regret that this difficulty should have arisen, as in our view it was wholly unnecessary to have raised it.

We discharge the rule.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

REGINA V. COLLEGE OF PHYSICIANS AND SURGEONS OF
ONTARIO.—IN RE JOHN MCCONNELL.

Medical practitioner—Conviction for felony—Removal of name from register—37 Vic. ch. 30, ss. 34, 39—Mandamus to restore.

One C. was convicted in 1869 of manslaughter, and sentenced to five years imprisonment in the penitentiary. Before its expiration his sentence was remitted, and in 1874, after the full period of sentence had expired, he applied to defendants for registration, and was duly admitted and placed upon the register as a bachelor of medicine. At the time of his application for registration the secretary was not aware of his conviction, and the applicant was not asked any questions. Subsequently, in 1875, on ascertaining the fact, by direction of the defendants, and without notice to C., the secretary erased his name from the register: *Held*, 1. That C. had clearly been guilty of no false or fraudulent representation within 37 Vic. ch. 30, sec. 39, O.

2. That the case was not within section 34 of that Act, which referred to a conviction for felony of a person already registered.
3. That in any case he could not be legally removed from the register without notice and an opportunity of being heard.

Quære as to the true meaning of section 34, and remarks as to the hardship which it might work.

A mandamus was, therefore, granted to restore his name to the register.

February 4, 1879, *Caswell* obtained a rule *nisi* for a writ of mandamus, requiring the College of Physicians and Surgeons of Ontario to restore the name of John McConnell to the register of said college, and to issue a new register or supplement thereto, and make public in the *Ontario Gazette* or otherwise the fact of the right of McConnell to have his name registered; and to pay the costs of the application.

It appeared that in August, 1874, the applicant applied for registration as a Bachelor of Medicine of the University of Toronto, paid his fees, and was duly admitted and placed upon the register.

In 1878 a new register was issued, in which the applicant's name did not appear.

It appeared that in the spring of 1869 the applicant was convicted of manslaughter, and sentenced to five years imprisonment in the Penitentiary.

In October, 1871, he was released by the Government, the residue of his sentence being remitted.

It was after the expiration of the full time of sentence for five years that he applied to the defendants, and was placed upon the register.

On the defendants' part it was shewn that in July, 1875, it was reported to the college that the applicant had in 1869 been convicted of a felony. Directions were given to the secretary to ascertain if this were true, and if true in fact, it was ordered that the applicant's name be erased from the register.

The secretary obtained a record of the conviction of the applicant, and in compliance with the directions he had received he erased the applicant's name.

The secretary swore that when McConnell applied to have his name entered on the register, he was not aware that the applicant had been convicted of felony, and he did not disclose said fact, but concealed it.

To this the applicant answered that he was asked no questions, and concealed nothing, considering that having undergone his sentence he was in the same position as if he had never been convicted.

After his registration in 1874 he continued practising his profession, and did not seem to have been aware, till 1878, that his name had been erased from the register.

February 14, 1879, *Kingsmill* shewed cause, referring to R. S. O. ch. 142, secs. 33, 34; *Regina v. Strett*, 13 Ir. C. L. 398; *Regina v. General Council of Education*, 7 Jur. N. S. 798; *Lamert's Case*, 4 B. & S. 582; *Leyman v. Latimer*, L. R. 3 Ex. D. 15, 352.

Robinson, Q. C., contra, cited *Rex v. The University of Cambridge*, Dr. *Bentley's Case*, 1 Str. 557; *Bullen v. Moodie*, 13 C. P. 126, 2 E. & A. 379; *Cooper v. Board of Works for the Wandsworth District*, 14 C. B. N. S. 180, 189; *Capel v. Child*, 2 Cr. & J. 558; *Bagg's Case*, 11 Co. 936; *Regina v. Cheshire Lines Committee*, L. R. 8 Q. B. 344; *Masters v. Pontipool Local Government Board*, L. R. 9 Chy. Div. 677; 32-33 Vic., ch. 39, sec. 128, D.

The arguments sufficiently appear in the judgment.

March 8th, 1879. HAGARTY, C. J.—The statute in force in 1874, when the name of the applicant was put on the register, was 37 Vic. ch. 30, O.

Sec. 19 provides for the keeping the book or register, in which every person is to be entered, and only those entered shall be qualified and licensed to practice, &c.

Sec. 25.—The council may make orders and regulations for regulating the registers.

Sec. 29 provides that any appeal from the decisions of registrars may be decided by the council, and any entry proved to the satisfaction of the council to have been fraudulently or incorrectly made may be erased from the register by an order in the writing of the council. The registrar, if dissatisfied, shall have the power, subject to an appeal to the council, to require further evidence.

Sec. 30.—Every person registered may practice, and sue and recover for his charges, &c.

Sec. 31.—The registrar shall issue a correct list of the names registered, a copy of which shall be *prima facie* evidence of the registration of persons named, and the absence of any name *prima facie* evidence that such person is not registered.

Sec. 34.—“Any registered medical practitioner who shall have been convicted of any felony in any Court shall thereby forfeit his right to registration, and by the direction of the council his name shall be erased from the register, or in case of a person known to have been convicted of felony, who shall present himself for registration, the registrar shall have power to refuse such registration.”

Sec. 35.—No person not registered can recover any charges, &c.

Sec. 39.—If any person shall procure his registration by means of any false or fraudulent misrepresentation or declaration, either verbally or in writing, the registrar, on receipt of sufficient evidence thereof, may represent it to the council, and upon a written order of the president, attested by the seal of the college, may erase the name from the register, and make known the fact in the Ontario

Gazette; and after such notice the person shall cease to enjoy any of the privileges of registration.

Sec. 40 makes it unlawful for unregistered persons to practice under penalties.

We cannot see any evidence or even suspicion that when the applicant applied for and obtained registration in August, 1874, he was guilty of any false or fraudulent representation or concealment.

We think it impossible to support the manner in which his name was erased from the register in 1875.

In the first place, the words of the statute seem clearly to refer to a conviction for felony obtained against a person registered. The conviction is declared to work a forfeiture of his right to registration, and the council may erase his name from the register.

This was not the applicant's case.

He had been registered without any fraud or misrepresentation after the whole period of punishment had elapsed. He has committed no felony thereafter to forfeit his right. But a more important principle was violated by the proceeding of the council. They took this step, so destructive of all the applicant's prospects in life, and of his rights and status of a professional man, without the slightest notice to him, without hearing him or giving him any opportunity of defending himself, and they did it with such secrecy that he was not aware of the fact for several years after.

The law seems very clear on the point, from *Dr. Bentley's Case*, 1 Str. 557, downwards.

It is very fully discussed in *Capel v. Child*, 2 Cr. & J. 578.

Bayley, B., says, "If you remove a corporator, and it turns out that he was not summoned, however gross and flagrant his misconduct may have been, he is entitled to be restored, and I know of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property, without his having an opportunity of being heard."

If it were necessary so to hold, we think we would hold this action of the defendants to be a judicial proceeding, not merely a ministerial act.

Sir Wm. Erle's judgment, in *Cooper v. Board of Works for Wandsworth*, 14 C.B.N.S.187, is very full on this head. The defendants had exercised a statutable power in pulling down plaintiff's house, without giving him an opportunity of being heard. "I do not undertake to rest my judgment solely upon the ground that the district board is a Court exercising judicial discretion; but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down."

Willes, J.: "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects. is bound to give such subject an opportunity of being heard before it proceeds, and that that rule is of universal application, and founded upon the plainest principles of justice."

Byles, J.: "A long course of decisions, beginning with *Dr. Bentley's Case*, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature."

The law is again fully discussed in *Regina v. The Cheshire Lines Committee*, L. R. 8 Q. B. 344.

Blackburn, J.: "The general rule is, that every man, before a decision is given against him in a judicial proceeding, is entitled to be heard, although the Legislature may by enactment, (not necessarily by express words if their intention can be otherwise clearly gathered), authorize a proceeding *ex parte*. This, however, cannot be presumed." The strong language of Parke, B., in *Bonaker v. Evans*, (in Error), 16 Q. B. 171, is cited.

Therefore, even if the applicant had committed felony after registration, we are of opinion that he could not

be legally removed without notice and opportunity of being heard.

Mr. Kingsmill called our attention to the case, in section 34, of a person known to have committed felony presenting himself for registration, as shewing that a pardon or undergoing of sentence would not restore him. It may be sufficient to say that such is not this case.

It may be that these words have been inadvertently used, and might be capable of working unexpected hardship.

It could hardly have been the intention to declare that any conviction of felony at any distant time, ten, twenty or thirty years, and punishment fully undergone, should for ever bar an application for admission to practise, or at any time, when discovered, work a forfeiture of the right to practise.

A man might be convicted of manslaughter for some criminal negligence, not possibly involving moral turpitude, such as neglect of machinery, adjusting railway points, ventilation of mines, or other neglect of duty, or from some criminal non-feazance.

It is startling to be told that after the lapse of any number of years of well-conducted respectable life, a perpetual bar was intended to be created like that urged here.

In the proceeding here taken, the council of the college seem to have wholly abnegated their judicial function, and left it to their registrar to decide what they should have decided.

Our law declares, 32-33 Vic. ch. 29, sec. 128, D., that in the case of an offender convicted of felony not punishable with death, who has endured the punishment to which he was adjudged, the punishment so endured shall, as to the felony, have the like effect as a pardon under the great seal.

This applicant is, we consider, in the like position as if he had undergone the whole sentence.

The very recent case of *Leyman v. Latimer*, L. R. 3 Ex. Div. 15, affirmed in appeal, L. R. *ib.* 352, is very instructive. Two Judges in Appeal, and two in the Court below,

seem to adopt the view that after undergoing sentence he is no longer a felon, and it may be actionable to call him so. It is equivalent to a pardon. A passage is cited, at p. 21, from Hawkins, P. C. (book ii., ch. 37, sec. 48.): "I take it to be settled at this day that the pardon of a treason or felony, even after a conviction or attainder, does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness, notwithstanding the attainder or conviction, because the pardon makes him as it were a new man, and gives him a new capacity and credit."

The Exchequer Judges call it a clear and unquestioned decision, and one reasonable and just. Lord Justice Brett says that a man who has endured his punishment is not now a felon.

Lord Justice Cotton thinks that the statute 9 Geo. IV. ch. 32, sec. 3, which is identical with ours, besides allowing previously disqualified persons to be called as witnesses, was also passed with a view to ascertain civil rights.

The difficulty that may possibly arise from the latter branch of the section (34) of our Medical Act need not be further discussed, as it does not meet the facts here.

It may be urged that our Legislature adopts the view that once a felon always a felon, and that the stain is indelible.

We should, if possible, reconcile the words to the actual state of the criminal law, and hold that the words, "A person known to have been convicted of felony," do not include a person who in addition has undergone his sentence, or has been pardoned.

We think the rule must be absolute for mandamus as prayed.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute, without costs.

THE GRAND HOTEL COMPANY V. CROSS.

Highway and square—Dedication—Plan filed—Mineral springs—Custom.

The owner of a township lot, having some mineral springs upon it supposed to be valuable, subdivided the land into village lots and streets, according to a plan, which he registered in 1839, and sold and conveyed lots by. On this plan was represented a square called "Richmond Square," in which the springs were situate. Until 1877 no charge was made for the water to those who came to drink it, but it was charged for by the gallon when carried away, and was sent to different parts of the country for sale: *Held*, that this shewed no intention to dedicate the square or the springs to the public, so as to give any right of entry or to drink the water without charge.

Held, also, following *Shuttleworth v. Le Fleming*, 19 C. B. N.S. 687, that pleas setting up a custom for inhabitants of the surrounding country as of right to drink the water for forty years were bad, for such right could not be claimed in gross under the Prescription Act, R. S. O. ch. 108, sec. 38.

Semble, per HAGARTY, C. J., that, apart from the statute, the alleged custom was bad, as being too large, and not confined, either in the pleas or in the evidence, to any particular class of persons.

Quære, whether a custom could be proved in this Province, there being no time immemorial on which to found it, especially where, as here, the land sought to be burdened therewith was only granted by the Crown within fifty years.

Upon the evidence in this case, set out below: *Per* ARMOUR, J., there was a highway leading to the springs legally established by the Quarter Sessions in 1829, and by the plan filed in 1839, and by dedication, and not legally closed by the proceedings taken and by-law passed in 1858; for, among other reasons, there was no proof that the formalities prescribed by the 22 Vic. ch. 99, sec. 308, as giving the right to pass such by-law, had been observed. *Per* HAGARTY, C. J.—Such objections could not now be entertained, and the evidence shewed that since that time there had been no user as a public highway, but only by persons going to and from the hotel and grounds, or to drink at the springs.

THE first count of the plaintiffs' declaration charged the defendant with breaking and entering certain land of the plaintiffs, being that portion of lot No. 20, in the 1st concession of Caledonia, on which was situated the wooden building or erection surrounding the mineral spring known as the gas spring, and the plank walk and wooden steps forming the approach to the said building or erection.

The second count charged the defendant with breaking and entering certain land of the plaintiffs, being that part of lot 20, in the 1st concession of Caledonia, enclosed

and occupied by the plaintiffs in the same enclosure with the Grand Hotel, and known as the grounds of the Grand Hotel Company of Caledonia Springs, and a fence and gate of the plaintiffs then standing thereon, and breaking and destroying the said gate and a portion of the said fence, and breaking open, damaging and spoiling a certain lock of the plaintiffs, [wherewith the said gate was fastened, and breaking the hinges of the said gate.

The third count charged the defendant with breaking and entering certain land of the plaintiffs, being that part of lot 20, in the 1st concession of Caledonia, enclosed and occupied by the plaintiffs in the same enclosure with the Grand Hotel, and known as the grounds of the Grand Hotel Company of Caledonia Springs, abutting northerly upon land occupied by one Nicholas Butler, and upon the public travelled road or highway from the village of Caledonia Springs to Vankleek Hill, which road leads westerly across a creek or gully to the travelled road leading from the village of Caledonia Springs to Horse Creek, and abutting westerly upon the said road to Horse Creek, and abutting southerly on a fence leading from the said road to Horse Creek easterly across said lot No. 20 to the easterly boundary of the said lot, and abutting easterly upon the said easterly boundary of the said lot.

Pleas. 1. Not guilty.

2. Land not the plaintiffs'.

3. To the first count, justifying the trespass as the use of a public highway for persons on foot and with horses, cattle, and carriages.

4. To the first count, justifying the trespass as the use of a public highway for persons on foot.

5. To the second count, justifying the trespass as the removal of obstructions on a public highway for persons on foot and with horses, cattle, and carriages.

6. To the second count, justifying the trespass as the removal of obstructions on a public highway for persons on foot.

7. To the third count, justifying the trespass as the use

of a public highway for persons on foot, and with horses, cattle, and carriages.

8. To the third count, justifying the trespass as the use of a public highway for persons on foot.

9. Leave and license.

10. Plaintiffs not a duly incorporated company.

11. Justifying the trespasses as the use of, and the removal of obstructions from, a right of way appurtenant to lot 22, 1st concession of Caledonia, of which the defendant was owner, and the occupier of which had for twenty years used the said way as of right, and without interruption, for the purposes of obtaining the waters of certain springs on said land of the plaintiffs.

12. That one William Parker, the predecessor in title of the plaintiffs, laid out on lot 20, in the 1st concession a certain village called the village of Caledonia Springs, and subdivided said lot into village lots, and laid out divers streets and squares, and caused a plan of such sub-division, shewing such streets and squares, to be made and filed in the registry office of the county, and sold and conveyed divers of said lots to divers persons, and among other streets and squares on said plan was a certain street called Richmond street, and a square called Richmond square, which plan was so filed on the 13th March, 1839, whereby said Parker dedicated said street and square to the public; and the alleged trespasses were the use of the same, &c.

The plaintiffs took issue upon the pleas, and new assigned to the third, fourth, fifth, sixth, seventh, eighth, eleventh, and twelfth pleas for trespasses committed by the defendant in excess of the alleged rights; and also in other parts of the said land, and on other occasions, and for other purposes than those referred to in the said pleas. The plaintiffs also replied to the eleventh plea, alleging that the way in that plea mentioned was used by the occupiers of the lot therein mentioned by the permission of the plaintiffs.

The defendant rejoined, taking issue on the new assignment, and on the replication to the eleventh plea.

The following particulars were delivered under the new assignment: "Trespasses committed by the defendant on the evening of the 24th September, 1877, in breaking open the gate and a portion of the fence at the entrance to the grounds of the plaintiffs, and in going over and upon the said grounds and premises to a certain building or erection surrounding the mineral spring upon the said land of the plaintiffs, known as the gas spring, and the plank walk and wooden steps forming the approach of the said building or erection, and in returning therefrom over and upon the said land of the plaintiffs."

At the commencement of the trial the defendant moved to add, as an additional plea, the plea of custom; and at the close of the case the defendant again applied for leave to add a new plea, a draft of which was filed among the exhibits, to which the plaintiffs raised no objection, provided the Court above should think proper to allow him to do so, with leave to the plaintiffs to plead and demur thereto. The defendant after the argument put in two additional pleas, intended to replace or to be in addition to that asked to be added at the trial.

The plea filed at the trial alleged a custom from time immemorial for the inhabitants of the township of Caledonia and the surrounding country and neighbourhood, to use water of the Caledonia Springs for medicinal, sanitary, and domestic purposes, and to enter upon the plaintiff's lands for the purpose of such use; and justified the trespasses as the use of a way, and the removal of obstructions therefrom, in order to enjoy such use of the said water.

The pleas put in after the argument alleged a custom for forty years next before the commencement of this suit for a similar purpose to that alleged in the plea filed at the trial, and justified the trespasses as in that plea. These pleas were demurred to, and the demurrer was argued with the rule (*a*).

(*a*) The pleas were as follow:—

13. That the close in which the said alleged trespasses were committed in the first count of the declaration mentioned was situated in the township of Caledonia, in the

The cause was tried without a jury at the last Spring Assizes, at L'Original, before the Judge of the county of Carleton, who entered a *pro formâ* verdict for the defendant.

county of Prescott, and that there then was and for and during the full period of forty years next before the commencement of this suit, and before the committing of the grievances in the said first count alleged, had been a certain custom in the said township and surrounding country, that is to say, that all the inhabitants of the said township and surrounding country had been used and accustomed, as of right and without interruption, during all the time aforesaid, to have, and of right ought to have had, and still of right ought to have the liberty of drinking of the waters of a certain mineral spring, known as the gas spring, and being the spring in the said first count mentioned, every year, and at all times of the year, at their free will and pleasure, and for such purpose to enter upon the land in which was situated the said spring and the wooden buildings surrounding said spring, being the land in the first count mentioned, and also to enter upon and use for such purpose the plank walk and wooden steps in the said count mentioned; and the defendant being an inhabitant of said township, and of right being entitled as aforesaid to drink the water from the said spring, and to enter upon the said land and to use said plank walk for the purpose aforesaid, entered upon the said land and used the said walk and steps for the purpose of drinking of the said waters, which are the trespasses in the said first count alleged.

14. That the close in which the said alleged trespasses were committed in the first and third counts mentioned, was situate in the township of Caledonia, in the county of Prescott, and that there then was, and for and during the full period of forty years next before the commencement of this suit, and before the committing of the grievances hereinafter mentioned, a certain custom in the said township and surrounding country, that is to say, that all the inhabitants of the said township and surrounding country had been used and accustomed of right, and without interruption, during all the time aforesaid, to have, and of right ought to have had, and still of right ought to have the liberty and privilege of drinking the water of a certain mineral spring, known as the gas spring, in the said first count mentioned, every year, and at all times of the year, at their free will and pleasure, which said spring was

At the trial the defendant admitted that he entered upon the land mentioned in the declaration and the house and enclosure covering the gas spring therein mentioned, being forbidden by the plaintiffs, and that such entry was made for the purpose of testing the right alleged by the defendant, to remove the said gate as obstructing a public highway, and to take and drink the said waters without the plaintiffs' permission, and against their will, as being upon a public square as alleged in the plans, and by prescriptive right or custom; and the plaintiffs stated that this action was brought to try such alleged right, and not to recover substantial damages.

situated in said close in which the alleged trespasses were committed, and for such purpose to enter upon the land of the plaintiffs where said spring was situated, and being the lands in the said counts mentioned, and to enter upon and use a certain road or way leading to the said spring: that the plaintiffs caused the gate in the second count mentioned to be erected across the said road or way leading to the said spring, and locked against the inhabitants of the said township and surrounding country, and the said gate to be closed at the time of the committing of the said alleged trespasses; whereby the said inhabitants and the people of the surrounding country at the time of the committing of the said alleged trespasses were prevented, by reason thereof, from going to and drinking water from the said spring as they were accustomed and of right entitled to do; therefore the defendant, being an inhabitant of the said township and of right entitled to drink water from said spring, and because the said gate was at the time of the said alleged trespasses across and upon the said highway obstructing the same, so that the said defendant as such inhabitant of said township could not go and return along the said way, nor could the other inhabitants of the said township and surrounding country, for the purpose of drinking said water, the defendant, for the purpose of using the said way for the purpose of going and returning along the same to drink said water, necessarily broke down the said gate, and a little damaged the same, and a little spoilt the said lock and hinges of the said gate, doing no unnecessary damage thereto, which are the trespasses in the said second count alleged.

The facts appearing at the trial, so far as they are necessary to be stated, were as follow :—

Lot 20, first concession of Caledonia, was granted by the Crown on the 12th November, 1831, to Orrin Kellogg, who had theretofore purchased it from the Crown, and had settled upon it in or shortly prior to the year 1828. The qualities of the springs having become known, Kellogg was desirous of getting a road to them, and set on foot the necessary proceedings for that purpose, and there was produced at the trial from the record of the Quarter Sessions the following report :—

<p>“DISTRICT OF OTTAWA. To wit.</p>	}	<p>To their Worships the Magistrates of the said District in Quarter Ses- sions assembled.</p>
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I, the undersigned, Anthony Swallwell, a surveyor of highways in and for the district of Ottawa, having received a requisition signed by more than twelve freeholders of the townships of Longueil and Caledonia, whereby I am directed to lay out a road or roads as follows, *i. e.*, commencing at the west end of the Caledonia road, thence westwardly to a bridge, a little north of the Caledonia Springs, also to lay out a road from said Caledonia Springs northerly on a picket line until it intersects the Chesser road, in consonance to the said requisition I have laid the said road or roads sixty feet wide, and I do hereby report and notify the same according to the form of the statute in such case made and required.

ANTHONY SWALLWELL,

Surveyor of Highways, District of Ottawa.

Longueil, 15th September, 1829.”

This was endorsed as follows :—

“15th September, 1829. Road report. Caledonia Springs. Read and established the 16th September, 1829.

R. P. HOTHAM, C. P.”

And the minute book of the Quarter Sessions was also produced, containing the following entry :—

“A. Swallwell’s road report (No. 3) being read, and no opposition made, the road is established.

D. PATTEE, *Chairman.*

September 16th, 1829.”

It did not appear in evidence where the west end of the Caledonia road was then, nor where the Chesser road was, but the latter was probably at Carrier's corners. The roads referred to were at once constructed, the latter being so constructed from Carrier's corners to the gas spring. The road to the gas spring had been travelled ever since by those travelling thither. A gate was, however, placed across it, south of Caledonia street, in 1845 or 1846, by one Wilkinson, the then proprietor of the springs, and in 1858 the Council of the corporation of the township of Caledonia passed a by-law purporting to close it south of that street. The proceedings then taken are set out in the judgment of Armour, J.

A block of several acres, including Richmond Square, the hotel, and the springs, had been enclosed, and this gate, from which the road led to the hotel, and at which there was a lodge and gate-keeper, formed part of such enclosure. After the by-law of 1858, the road to Horse Creek mentioned in that by-law was opened to the west of the enclosure, and had since been travelled.

In 1837, the property having passed from Kellogg to Parker, the latter, or one Whitney who was interested with him in the property, caused a plan to be made laying out the property into streets and lots, with a square, called on the plan "Richmond Square," in which square were situated the springs. In this plan the roads laid out by Kellogg are called Caledonia and Richmond streets, respectively. This plan was filed in the Registry office for the counties of Prescott and Russell, on the 13th day of March, 1839. After this Parker had two *tirages au sort* of lots, and in this way sold a large number of lots fronting on Caledonia, Richmond and other streets, and on Richmond Square. These lots were all described in the sales thereof, and in the conveyance of such of them as were conveyed, according to the said plan. From Kellogg's time down to June, 1877, the public from wheresoever they came were permitted to drink the waters of the springs without any charge or hindrance, but if a larger quantity than a gallon

or as much as a gallon was taken away by any one, a charge of five cents a gallon was made for it.

In June, 1877, the plaintiffs adopted a system of tickets, and required any one who desired to drink at the springs to procure a ticket, for which a small charge was made.

This created some excitement in the neighbourhood, and the defendant, in the interest of those opposed to this system, broke down the gate which stood in the same place as that put there by Wilkinson, and went down to the springs and drank without a ticket in assertion of the alleged public right to the highway, and to drink the waters of the springs.

In Easter term last, *Robinson*, Q. C., obtained a rule *nisi* to set aside the verdict for the defendant, and enter it for plaintiffs, on the ground that the plaintiffs' title to the land in question, and the trespasses committed, were shewn by the evidence and admitted, and that no justification therefor was shewn, and the evidence did not support the pleas (a).

29th November, 1878. *Bethune*, Q. C., (Cross with him), appeared to shew cause to the rule and in support of the pleas. They cited *The Corporation of Wyoming v. Bell*, 24 Grant 564; *O'Connor v. Dunn*, 37 U. C. R. 430; *Gummerson v. Banting*, 18 Grant 516; *Attorney-General v. Town of Brantford*, 6 Grant 592; *Saugeen v. Church Society*, 6 Grant 538; *Rochdale Canal Co. v. King*, 20 L. J. Chy. 675; *Bankart v. Houghton*, 28 L. J. Chy. 473; *City of Toronto v. McGill*, 7 Grant 462; *Race v. Ward*, 4 E. & B. 702.

Robinson, Q. C., contra. The proprietors of the hotel had no inducement to go to the large expense which they incurred in building the hotel, &c., save the profit which they expected to derive from the springs, and they never dedicated the waters to the public. Those who drank the

(a) The case was argued on the 29th May, 1878, when *M. C. Cameron*, Q. C., and *Cross*, shewed cause to the rule, which was supported by *Robinson*, Q. C., and *Chrysler*. In consequence of the changes on the Bench following the death of *HARRISON*, C. J., the case was re-argued this term.

water were never charged ; those who took it away were. The statute never contemplated waters of this kind, but water rights commonly so called in this country. Plaintiffs have appropriated the water for their own use by works erected by them. There is no limited dedication of water, and the plaintiffs charged for taking it away. Though the square may be a public square, it does not give them the right of ingress and regress, but only that it should not be built upon; and even if they could enter they have no right to the water. As to the right of way, the evidence does not shew a dedication. Since 1846, there has always been a gate, and the highway leads nowhere except to the hotel and back. It does not go to the springs. He referred to *Regina v. Plunkett*, 21 U. C. R. 536 ; *Belford v. Haynes*, 7 U. C. R. 461 ; *Regina v. Hall*, 17 C. P. 282 ; *Barracrough v. Johnson*, 8 A. & E. 99 ; *Angell*, 152 ; *Fisher's Digest*, 8636 ; *Washburn on Easements*, 128, 130, 132, 153, 180, 183, 184, 186, 201, 204, 207 ; *Gale on Easements*, 207, 216, 252 ; *Regina v. Rankin*, 16 U. C. R. 304 ; *Regina v. Spence*, 11 U. C. R. 31 ; *Poole v. Huskinson*, 11 M. & W. 827 ; *Paul v. James*, 1 Q. B. 832. There is no means of telling where the road was : *Rex v. Sanderson*, 3 O. S. 103 ; *Re Lawrence and Corporation of Thurlow*, 33 U. C. R. 223 ; *Regina v. Great Western R. W. Co.*, 32 U. C. R. 506. Then as to the pleas. The custom alleged has never been acted upon, and is purely imaginary. The highway used is not the one according to the plan. The statute only applies to towns and villages. This place was not a village. The plan does not comply in other respects with the requirements of the statutes : *O'Brien v. Village of Trenton*, 6 C. P. 350, 7 C. P. 246 ; *Rossin v. Walker*, 6 Grant 619 ; *Regina v. Rubidge*, 25 U. C. R. 299 ; *Regina v. Ouellette*, 15 C. P. 260. The highway, if any, has been closed up by the municipality.

March 8th, 1879. ARMOUR, J.—The pleas lastly added were admitted by the defendant's counsel, on the argument for the demurrer, to be incapable of being supported after

the decision in *Shuttleworth v. LeFleming*, 19 C. B. N. S. 687.

The plea added at the trial was a plea similar to that pleaded in *Race v. Ward*, 4 El. & Bl. 702, a plea of custom.

A plea of such a custom would probably be held bad in this country, because here there is no time immemorial on which to found it, but the evidence at the trial shewed the origin of the alleged custom, and as that cannot be, in such a case as pleaded, a custom of which the origin is known, that plea must be found against the defendant: *Bryant v. Foot*, L. R. 2 Q. B. 161, 3 Q. B. 497.

It was contended, however, that there was a dedication to the public of the springs, and of the right to drink the waters of them.

Dedication is a question of intention, and it was said that the laying out of and marking in the registered plan, "Richmond Square," within which the springs were, afforded evidence of such intention, as also did the permitting of the public for so long a time to drink the waters without charge or hindrance.

I do not think that the laying out of the square, and marking it as a square, indicated of itself any intention to dedicate the square to the public, still less did it indicate an intention to dedicate the springs, merely because they were within it; nor did in my opinion the permission accorded to the public to drink the water afford any evidence of an intention to dedicate.

The evidence is altogether against such an intention, for it would be contrary to reason to suppose that the owners of the property intended to dedicate to the public the only thing that made the property of value, and out of which alone they hoped to reimburse themselves for the large outlay made in its developement.

The defendant entirely fails, in my opinion, to establish any justification for going down the steps to and going into the gas spring house, and drinking the water there.

The question of the highway is one of rather more difficulty.

I think there can be no doubt that the road leading from Caledonia street south to the springs was part of the highway laid out by the Quarter Sessions, and described in Swallwell's report under the words, "also to lay out a road from said Caledonia Springs northerly on a picket line until it intersects the Chesser Road."

It was argued that the words "Caledonia Springs" did not mean the springs themselves, but meant Rocheau's Corners, formed by the intersection of Richmond and Caledonia streets, and that this road commenced there; but there is no ground for this argument, for these corners did not exist when Swallwell's report was made, and there was no other place to which the words could refer but the springs themselves, and the oral testimony shews conclusively that the road commenced at the springs themselves.

Whatever vagueness there was in the report as to the description of this road was altogether removed by what was done on the ground. The road was laid out and picketed, and Kellogg, the then owner of the land, himself superintended, if he did not actually construct it. Nor is there any room for doubt that the road so constructed was constructed with public money. The lands through which the roads reported on passed belonged to Kellogg, and there could be no other object, therefore, in his applying to the Quarter Sessions to lay them out, but to get them constructed with public money.

The conduct of Kellogg afforded irresistible evidence of his intention to dedicate to the public the road in question.

The road south from Caledonia street has remained ever since in the same position, at all events, where the gate was, where it was constructed by Kellogg, and was recognized as a public highway by all the successive proprietors of the property down to and inclusive of Wilkinson.

In the plan made by Parker Richmond street was intended to occupy the site of this road, and the sale of lots fronting thereon made it a common and public highway under 12 Vic. ch. 35, sec. 41.

It was argued that this section did not apply, because "villages" therein referred to meant incorporated villages; but I am of opinion that such a meaning cannot be ascribed to it, because it was only in the same session that villages were incorporated and permitted to be incorporated: See 12 Vic. ch. 81, sec. 52.

Evidence was also given, although not of a very satisfactory character, that the road in question was not upon Richmond street if produced southerly from Caledonia street in the line occupied by it north of that street, but I think there is little doubt that when the lots and streets were laid out on the ground, the road in question was adopted as Richmond street, and it is the work on the ground that must govern: *McGregor v. Calcutt*, 18 C. P. 39.

Wilkinson, when he put the gate across the road, treated it as a public highway, for he asked permission of the people in the neighbourhood to put the gate there, and they gave him their permission to do so, provided he kept a gatekeeper to open it when required.

Wilkinson continued to treat it as a public highway when he signed the petition to George Ross in 1858, to which I shall have occasion presently to refer.

The question then arises: Had the by-law passed by the council of the corporation of Caledonia in 1858 the effect of closing the road in question?

The clerk of this council was called as a witness, and produced the minute book of the council, and all the papers in his possession relating to this road. He was the successor of the clerk of 1858. The papers referred to consisted of a petition to George Ross, George Ross's report, a resolution of the council, and the by-law in question.

The petition is dated November 19th, 1858, addressed to George Ross, surveyor of highways for the township of Caledonia, and is signed by Wilkinson and others, praying for an alteration "of that portion of road within the enclosure of the race course, by commencing south of the bridge over Attican creek on the race course, and continuing along the westerly side of said course till it intersects the

road now travelled to the saline spring on Horse creek," and that he would report the same to the council at its next meeting.

Ross accordingly reported to the next meeting of the Council, held December 27, 1858, as follows:—

"On the requisition of twelve freeholders, and to me directed, to lay out a road through part of lot number twenty, in the first concession of this township, and in conformity with said requisition, I have laid out said road, commencing at the south end of the new bridge over Esecen creek, south of James Brock's store on said lot No. 20, and continued along the racecourse in a south-westerly direction till I intersected the road formerly run by Simeon Eastman to the saline spring or horse creek, from the Court house, a distance of about 25 chains and $44\frac{1}{2}$ feet from the place of beginning; which portion of road I carefully examined, and found it a first rate stand for a road, and do recommend the Council to adopt said road. Furthermore, I have examined the old road now travelled, and find it encroaches upon buildings, pleasure grounds, and plantations, and not so good a stand for a road as the one I have now laid out."

On the same day this resolution was passed:—

"Moved by Duncan McLeod, seconded by Donald McKericher, that the committee on roads and bridges be composed of all the members present."

"1st. The committee on roads and bridges beg leave to report, that with respect to the report of Mr. George Ross, surveyor of highways, recommending an alteration in part of the road leading from the telegraph road to Caledonia springs, and Caledonia springs and Caledonia flats, that portion within the race course shall be closed, and the road laid out by Mr. Ross be adopted in accordance with the report, and a by-law passed to that effect."

On the same day the by-law is passed, which is as follows:—

"By-law for altering the road leading from the telegraph road to Caledonia springs.

"The Caledonia municipal council, at its fourth sitting, duly assembled at the Town Hall, Caledonia flats, on Monday, December 27th, 1858, doth ordain and enact, and it is hereby ordained and enacted, that in compliance with the Municipal Institutions Act of Upper Canada, cap. 99."

"Be it enacted by the authority of the same, that the portion of the road leading from the telegraph road to Caledonia springs and Caledonia flats, namely, that portion of the same within the race-course, shall be closed, and the road laid out by George Ross be adopted in accordance with the report."

No attempt was made to prove that the formalities prescribed by 22 Vic. ch. 99, sec. 308, under which this by-law was passed, and the observance of which alone gave the council power to pass this by-law, had been complied with; and it is to me perfectly obvious that such formalities never were complied with, not only from the fact of the report, which was the basis of the by-law, being only made the same day, but from the fact that the statute in question only came into force on the first day of December, 1858, less than one month before the passing of this by-law, and by it all former municipal acts were repealed. See *Lafferty v. Stock*, 3 C. P. 1.

I quite agree with what was said by the late Chief Justice McLean in *Winter v. Keown*, 22 U. C. R. 346.

"The plaintiff on the trial proved no notice of the intended by-law as required by the 8th section of 20 Vic. cap. 69, under which the council profess to have acted, nor any notice under the 308th section of 22 Vic. cap. 99; and as their authority to pass any by-law under either of these Acts for selling an original allowance for road depended upon such notice being given, I think that we cannot dispense with the due proof, not only that a by-law was passed, but that it was passed with an observance of all the terms on which their power to pass such a by-law depended."

The remarks made by the present Chief Justice of this Court in the same case are to my mind quite appropriate

to the present: "I agree," he says, "however, with the learned Chief Justice in holding that it was necessary to give some evidence of the statutable notices having been given. The Legislature has given a certain power to the municipality, and it seems to me that such power must be strictly executed. We can hardly, I think, apply the *omnia rite acta præsumuntur* doctrine to a case like this. It may well be applied to the very different case of a sale of lands by a sheriff. There the Court may presume that all proper notices were given of an intended sale, and that the officer did his duty correctly. Here the power is given to a municipality to be exercised in certain cases for its own benefit and profit, and seems to me not to be governed by the same principle as the case suggested."

In the case before me, it was all important that the notices required by the statute should have been given, because the closing of the road altogether prevented some persons from ingress and egress to and from their lands, and I doubt very much whether the council, on this account, had, under any circumstances, power to close this road: 22 Vic. ch. 99, sec. 305.

And I cannot think that there could be any acquiescence such as would validate a by-law passed as this was—a by-law of which no one had notice who was affected by it, and in a case in which the public continued to use the road as they had done from the time Wilkinson put up the gate till after the plaintiffs acquired the property and began to lock the gate. Nothing was done upon the ground; no change was made after the by-law, but everything continued precisely as before, without anything being done to notify the public that the road had been closed.

I am moreover of opinion that the by-law, so far as it relates to the closing of the road, at all events is too vague and indefinite to have any validity.

I am, therefore, of opinion that the by-law in question had no effect to take away the character of the road in question as a common and public highway, and that the defendant has in that respect made out his justification.

I think the verdict should be entered for the plaintiffs for \$10 damages, with full costs of suit, and that the finding on the issues should be distributed according to the views I have expressed.

HAGARTY, C. J.—A perusal of the evidence leads to the conclusion that the main point sought to be established by the defendants was the right to drink these medicinal waters.

The right of way, or rather the alleged highway over the plaintiffs' premises, seems to be a matter subsidiary to the main purpose of access to the springs.

It does not bear the aspect of an ordinary claim of highway for passing and repassing from one point to another, and except to affirm or support the other claim seems hardly insisted on.

Now this alleged right to drink the waters was claimed on behalf of the whole world. Defendant's witnesses emphatically declared that people from all parts, from California, from the banks of the St. Lawrence, fifty miles off, exercised such right.

In this they have both asserted and proved too much.

Shuttleworth v. LeFleming, 19 C. B. N. S. 687, (to which we must refer more fully hereafter,) seems to place a claim like that of defendant's although an easement, or in the nature of an easement, as not within the Prescription Act, but to be proved if provable at all, without its aid. The pleas which defendant desired to add present his case in the form that for the last forty years there had been a certain custom in the township of Caledonia for inhabitants of the surrounding country, as of right, to drink the waters of these mineral springs, &c., &c.

The remarks of Jessell, M. R., in *Hamerton v. Honey*, 24 W. R. 603, are much in point: "A custom, as I understand it, is local common law. It is common law because it is not statute law; it is local law because it is a law of a particular place as distinguished from general common law. Now, what is the meaning of local common law?

Local common law, like general common law, is the law of the country as it existed before the time of legal memory, which is generally considered the time of Richard I. Therefore, when people allege a custom they allege that which they call a custom as having been the law of the place before the time of legal memory. * *

"Again, what must be the usage proved? It must not only be consistent with the custom alleged, but, if I may use the expression, not too wide. For instance, if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation not only that some people danced, but that every body else in the world who chose danced or played cricket, you have got beyond your custom. It is not confined to what you say it is. * * You cannot select a bit of the practices proved which might possibly have a legal origin, and say that the evidence must be rejected, which would shew that bit to be only a small part, say one-twentieth of the whole usage, of which the remaining nineteen-twentieths may be utterly incapable of legal origin, and therefore that the one-twentieth must be assumed to have had a legal origin."

His observations as to interruption are valuable.

A case of *Cox v. Schoolbred*, apparently to the like effect, is mentioned in the *Law Times*, November 30th, 1878, as having been just decided. I have not yet found the report.

Race v. Ward, 4 E. & B. 702, decides that water issuing from a well or spring is not to be considered as produce of the soil, so as to make the right to take it *in alieno solo*, for domestic purposes, a profit a prendre. It is an easement only, and may be claimed by custom. A plea was held good on demurrer, justifying under a custom from time immemorial for all the inhabitants of the township, (a very different thing from a township in Ontario), in which the close was, to take water from the well or spring and carry it to their houses for domestic purposes. There is a learned argument and a full judgment of Lord Campbell. The distinction seems fully understood between such an ease-

ment claimable by the inhabitants of a particular village or parish, and a general claim on behalf of all the world. It seems to be treated as "a customary right by reason of inhabitancy."

Shuttleworth v. LeFleming, 19 C. B. N. S. 687, already cited, sets up a right to a free fishing in the plaintiff's water, averring an enjoyment as of right, &c., for sixty years. The head note is that the Prescription Act, 2 & 3 Wm. IV. ch. 71, does not apply to easements or profits *a prendre in gross*.

The case is very elaborately argued and discussed. In the judgment the Court hold that "rights claimed in gross are not within the Act."

Quoting *Mounsey v. Ismay*, 3 H. & C. 486, they adopt its language: "What we think Lord Tenterden (in the Prescription Act) contemplated were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment." * * And finally: "Assuming the Legislature to have had in view all the rights formerly claimable by prescription to which the Act was intended to apply, it is necessary implication to hold that prescriptive rights in gross are not within the scope of the statute at all." The Court considered the language of the 5th section, (equivalent to section 38 R. S. Ont. ch. 108), decisive of the question.

The language of Buller, J., in *Fitch v. Rawling*, 2 H. Bl. 397, is sometimes referred to: "How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must, in their nature, be confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom."

It is needless to discuss the difficulties parties must be under in attempting to establish a custom in Ontario, especially where, as here, the land sought to be burdened therewith was only granted by the Crown within less than half a century.

Holding the alleged custom to be bad, it remains to con-

sider the defence set up, as to there being a common highway over the plaintiffs' land.

Except for the purpose of drinking or taking the mineral water, it is not easy to see what the value or object of such a claim can be, or whether the user stated as establishing the highway ever existed except for the purpose of doing what we are now holding could not lawfully be done against the will of the owner of the soil.

A set of admissions were made and used at the trial. Amongst them (No. 3) was one by defendant, that he entered on the land, house, and enclosure covering the gas springs, being forbidden by the plaintiffs, and that such entry was made for the purpose of testing the right alleged by defendant to remove the gate, as obstructing a public highway, and to take and drink the water with such permission, as being upon a public square and by prescriptive right or custom, and that the action is brought to try such right, and not for substantial damages.

As I understand the plans, the plaintiffs insist that all within the gate removed by defendant is their private property. Defendant insists that the gate is across the road or way, which the public has used as of right for many years.

This road was closed by the township council in December, 1858, and another road laid out instead, marked on the plan as the road to Horse creek.

Since that time, I think, on the evidence, the proper verdict should be, that the road within the gate was not used as a public highway, but merely for persons going to or from the hotel and grounds, or by persons going to drink at the springs, and that simply under the claim of its being a public road, in the ordinary understanding of the term, the defence fails.

I do not think the mere fact that the municipality, at the request of the proprietors, or otherwise, did, as alleged, put a few loads of gravel on the road inside the gate, can of itself establish it as a highway.

The remarks of Sir J. B. Robinson in *Belford v. Haynes*,

7 U. C. R. 467, are much in point as to a small expenditure of public money not being conclusive of the right, and also as to the kind of user: "Each case must depend on its own circumstances, and it must commonly be a question for the jury with what intention the user has been permitted."

We may also refer to *Regina v. Plunket*, 21 U. C. R. 536. The same learned Judge (than whom no one was more thoroughly conversant with the road system of Canada,) there remarks on the effect of the expenditure of public money or labour.

As a juror, I find, without hesitation, against the defendant's contention for this road as a public highway.

I consider it out of the question that we should entertain any objections to the by-law passed twenty years ago, such as are urged here. I think we must hold the road established by it as lawfully opened and the other as closed. What was done was, at all events, a formal renunciation in behalf of the municipality of any right to the road over the plaintiff's land. During these last twenty years all the alleged user was simply to drink the waters or to pass through the plaintiff's land to his hotel or springs.

Any rights that may be possessed by Mrs. Parker in her peculiar position on her lot are unaffected by our deciding against the defendant in this suit.

I think the plaintiff's rule should be absolute to enter a verdict on the whole record for \$10, with certificate for full costs.

CAMERON, J., took no part in the judgment, having been concerned in the case at the bar.

Rule absolute.

WHEELDON V. MILLIGAN (TWO CASES).

Husband and wife—Surrender of lease by wife—Proof of authority.

Plaintiff, being indebted to defendant for rent and otherwise, left the country with the intention, as he said, of going to Manitoba to look for land. On his way he wrote the following letter to his wife: "Dear Polly—I am very sorry indeed. I suppose you think it strange I have not been home; but so many demands upon me at this time, I found I could not meet them. The first hint is, I have gone across the water to Manitoba, and went on Thursday. As regards Mr. Milligan's affairs, I wish you to do the best you can; but tell Mr. Milligan not to be afraid of me. I will see him all right * * Now if Mr. Milligan will do the thing that is square, that is all right; but I hope he will be a friend to you, and I will be the same to him." The lease, under which the rent was due, was for seven years from 1st January, 1877, and the plaintiff left in October, 1878, having done no summer fallowing, as he was bound by the lease to do, and no fall ploughing, and leaving money enough at most only to pay the rent. On receipt of this letter plaintiff's wife sold his chattels to defendant at a valuation, and executed a surrender to him of the demised premises, of which defendant then resumed possession. Plaintiff returned in four or five weeks, when defendant gave him notice of the valuation and that he intended to sell the goods on a day named, and held them until then subject to plaintiff, and that the premises were open for the plaintiff for two months to enter and fulfill his lease; but the plaintiff would have nothing to do with this offer, and sued defendant in trespass and trover, as also on the covenant for quiet enjoyment in the lease:

Held, HAGARTY, C. J., dissenting, that he could not recover, for that, coupled with the evidence, more fully set out below, the letter to his wife clothed her with authority to part with the property, and surrender the premises to defendant.

THE first of these actions was trespass and trover for certain goods, to which was pleaded not guilty, by statute, (Imperial 2 Geo. II. ch. 19, secs. 19, 20 & 21); that the goods were not the plaintiff's goods; and leave and license; upon which issue was joined.

The second action was on the covenant for quiet enjoyment contained in a lease from the defendant to the plaintiff, alleging an eviction by the defendant, to which was pleaded *non est factum*, denial of eviction, surrender-surrender by Act or operation of law, forfeiture by non-payment of rent, and forfeiture by non-repair, &c.

Issue.

Both actions were tried together by Hagarty, C. J., without a jury, at the last Assizes at Owen Sound, who entered a verdict for the plaintiff in both actions, with \$500 damages in the first, and \$50 in the second.

The facts appearing at the trial were shortly these :—

The plaintiff entered into possession of certain land of the defendant, as tenant thereof to the defendant, about the beginning of April, 1877. A lease was subsequently drawn up and executed by both parties, bearing date the first day of January, 1877, and made in pursuance of the Act respecting short forms of leases, to hold for seven years from January 1st, 1877, at a yearly rent of \$265, payable in advance on the first day of January of each year, "the first of such payments being due and payable on the day of the date of this lease, but not yet paid," and containing, among others, covenants to pay rent, to repair, to keep up fences ; and containing also this stipulation : " It is specially agreed that any neglect, wilful or otherwise, to perform any part of the above mentioned stipulations or agreements, shall render this lease null and void, and shall terminate the interest of the party of the second part therein, and shall empower the party of the first part to resume possession of said clearing, except the party of the second part shall be liable to the party of the first part for any rent that may then be due and unpaid, or any portion thereof."

No rent was ever paid under this lease, and the plaintiff became largely indebted to the defendant, and the defendant became security for the plaintiff for several sums, making the whole claim by the defendant against the plaintiff, including the sums for which he was liable, but irrespective of the rent, about fourteen hundred dollars.

The plaintiff did no summer fallowing on the premises as he was bound by his lease to do, nor did he do any fall ploughing, and he went away about the 8th of October, leaving \$165 with his wife for the purpose, as he said, of paying certain notes made by him, and for which the defendant was liable.

He said, "My intention was to go to Manitoba. When I got to Meaford I found it was a long way, and I wrote a letter to my wife that I was going to Manitoulin. I wrote a letter to tell her I had met an old-country friend. * * The woman knew where I was going. These notes had to

be met, and I left the money there to meet them. I went merely to look for land in Manitoba. I had no demands I could not meet."

His wife said she knew where her husband was going when he went away. She believed he intended to go to Manitoba. Then he went to Manitoulin. He told her he was going to Manitoba when he went away. He met with a friend she believed. He would have gone if he had not met with that friend. The letter referred to by the plaintiff was put in evidence, and was in these words:

"DEAR POLLY,—I am very sorry indeed. I suppose you think it strange I have not been home. But so many demands upon me at this time I found I could not meet them. The first hint is, I have gone across the water to Manitoba, and went on Thursday. As regards to Mr. Milligan's affairs, I wish you to do the best way you can. But tell Mr. Milligan not to be afraid of me, I will see him all right. But I suppose you want now the contents of the matter. I met with a good old friend of mine, and wish me to go with him. Now if Mr. Milligan will do the thing that is square, that is all right; but I hope he will be a friend to you, and I will be the same to him; so good-bye, and God bless you all. I remain your loving husband.

"B. WHEELDON."

This letter was received by the plaintiff's wife on Saturday, October 20th, 1877, and shewn by her to the defendant on the same day.

The following Monday, one Howey, assuming to act on behalf of the plaintiff's wife, and one Matheson, acting for the defendant, valued all the goods then found on the place, with the exception of the household furniture and some wheat, at the sum of \$394.44, and the wife of the defendant on the following day executed the subjoined instrument under her hand and seal:

"Whereas my husband, Benjamin Wheeldon, lately of the township of Holland, in the county of Grey, farmer, has had rented of and from Joshua Milligan, of the same place, merchant, a farm of land; and whereas my said husband has now recently sold most part of the crops, stock,

&c., off the said farm, and without paying the rent or other things has taken the money, the proceeds of said sales, and left me and our family, and I have good reason to believe, and I verily do believe, he has gone to Manitoba, or some other place, with no intention of returning; and whereas I have now sold to the said Milligan certain stock, farm produce and implements, to pay the creditors of my said husband, for which the said Milligan is security, being Michael Howey, C. Goode, Dr. McGregor, and Robert May, and taxes, and whatever balance there may be to be placed to the credit of my said husband, on his running account with the said Milligan; the price of the said goods is now mutually, by myself and the said Milligan, left to the valuation of William Howey and Duncan Matheson, and as I cannot, myself or family, pay rent for or keep the said farm, I hereby, by these presents, give up, return, and hand over to the said Milligan all my right, title, and interest, in and to the said farm, or any lease thereof, as well as all the right, title, and interest of my said husband in and to the said farm, or any lease thereof, or anything whatsoever to the same appertaining."

On the following Friday, the defendant, suspecting that she had some grain secreted, went to the house, when she gave him up some peas and oats which she had secreted, also a clock and stove which had been got from the defendant and had not been paid for. He then, on that or the following day, moved her, her family and household stuff, into a house on his own place, and took full possession of the farm.

She said all these arrangements were forced upon her by the defendant. The evidence on the defendant's part was, that they were made at her own suggestion and with her own free will.

On or shortly before November 15th, 1877, the plaintiff, returned, and the defendant served him with this notice: "Copy of the goods and chattels valued by Wm. Howey and Duncan Matheson as between Mr. or Mrs. Benjamin Wheeldon and J. Milligan: said goods are now all in the possession of the said J. Milligan, subject to the said B. Wheeldon, until Monday next, to be sold by public auction if he prefers; also the clearing and buildings on west half

lot 4, concession 6, and north-west quarter of lot 5, concession 6, township of Holland, is yet open for the said B. Wheeldon for the space of two months from this date to enter and fulfil his agreements according to his lease thereof." (Then followed a list of goods and valuation.)

The plaintiff would have nothing to do with this offer, but brought his action on November 23rd, 1877. The learned Chief Justice gave the following judgment:—

"I am of opinion and find that the plaintiff knew the effect of his lease, and that rent was payable in advance. I find his wife knew what she was doing when she executed the agreement. I find she assented to what the defendant did, and as far as she could do she consented to quit the place and give everything up. I find that the defendant did not seize or enter as landlord, but acted and relied wholly on the arrangements with the wife: that he counted the year's rent as part of the claim for which he got all these goods. I have ruled that if in October he took or seized for rent in advance up to a future period viz., to January, he cannot enter as for condition broken for alleged breaches as to fences, thistles, &c., which he saw and knew of, as I find he did know.

I think on the whole \$500 would be a fair value to put on the things taken. I find that besides the rent the defendant had a large account, to some hundreds of dollars against plaintiff. It seems that the plaintiff came back after an absence of three or four weeks, but from his letter it would naturally be assumed he had gone to Manitoba for a prolonged absence, or perhaps not to return. The great difficulty is, to decide the extent of the wife's authority under this letter. Plaintiff swears he only meant to authorize her as to defendant having gone security or endorsed for him, and denies authorizing a sale or surrender of the term. I find difficulty in holding that this letter gave power to the wife to sell everything, and give up a term of seven years only in its first year. Plaintiff says she is to do the best she can as to defendant's affairs, but he added, 'Tell Mr. Milligan not to be afraid of me, I

will see him all right. If Mr. Milligan will do the thing that is square, that is all right, but I hope he will be a friend to you, and I will be the same to him.' Some of the language would be hardly necessary if the intention was to give her power to give up everything, and surrender the lease, as there would be nothing else left, or anything for Milligan to exercise kindness or forbearance on. I fear that defendant did what he did at his peril. I think the case requires full argument, and for the present I think I had better find for plaintiff, damages \$500, the value of the goods, leaving it to the Court to say how the law should be applied.

There is also the second suit for eviction. I must enter a verdict for plaintiff also on the same grounds in *Wheeldon v. Milligan*, action for eviction. I find that the landlord did not enter as for condition broken, for rent in arrear, or breach of covenant. I assess damages at, say \$50, with certificate for costs. All must be argued. I do not think it a case for large damages."

21st November, 1878, *Masson* obtained a rule *nisi*, in each case, for a nonsuit, or to enter a verdict for the defendant, on the law, evidence, and weight of evidence.

6th February, 1879, *McFayden* shewed cause. Plaintiff's letter to his wife, in alluding to defendant's affairs, pointed merely to the Howey note, which was then about falling due.

The evidence shews that defendant took forcible possession of the goods, and by threats forced plaintiff's wife to sign the agreement.

Masson, contra. In putting a construction on the letter written by plaintiff to his wife, while on his way to Manitoba, the circumstances in which he and his wife were should be considered, and in the light of these circumstances the letter should be read. The evidence of the plaintiff should not be received in order to narrow or change its meaning. Plaintiff had absconded to get rid of demands he could not meet; he says so in the letter, and he cannot

now say anything to the contrary. The letter cannot refer to the Howey note, for if plaintiff and his wife both say he left money with her to pay it, therefore Milligan, as endorser, could have nothing to do with it; it could not be called Milligan's affair. His whole conduct shows he intended to abandon the place. He evidently intended to be absent for a length of time, and must have known that his wife, with not enough to pay rent, without a team to work the place, or seed to sow, and a large debt hanging over her, could do nothing with it. He therefore writes to her to do the best she can, which, under these circumstances, must be understood to mean, as she seems to have understood it, that he authorized her, with what he had left her, to do the best she could and he would ratify it all. The defendant acted in good faith and leniently throughout, and on plaintiff's return offered to restore the place, but plaintiff would have nothing to do with it. If the agreement with the wife is void, the entry and taking of the goods can be justified under the first plea, defendant being entitled at the time to distrain for rent in arrear, and at the time of action he had the goods. He referred to *Halfpenny v. Pennock*, 33 U. C. R., 229; *Ramsay v. Stafford* 28 C. P. 229; *Tyrrell v. Rose*, 17 Grant, 39; *Crowther v. Ramsbottom*, 7 T. R. 654; *Phillips v. Whitsed*, 2 E. & E. 804.

As to the eviction case, the circumstances show that plaintiff abandoned the place. His wife, who retained possession for him, also abandoned it. No force was used. The learned Chief Justice found, as a fact, that she acted knowing what she was doing, and voluntarily. A verbal surrender acted on is a good surrender by act and operation of law. If the agreement of 23rd October stands, then the goods were applied on the running account, and the rent remained unpaid: for that and other breaches defendant was entitled to enter and evict. He cited *Thomas v. Cook*, 2 B. & A. 119; *Crocker v. Sowden*, 33 U. C. R. 397. The plaintiff ratified the agreement with his wife by taking advantage of the house furnished rent free by defendant: *Ramsay v. Stafford*. 28 C. P. 229.

8th March, 1879. ARMOUR, J.—The justice of these cases is entirely with the defendant, and we ought to decide them in his favour, unless we are debarred from so doing by some imperative rule of law.

After carefully considering the evidence, I am led to the conclusion that where the evidence on the part of the plaintiff differs from that on the part of the defendant, the latter is to be looked upon as the more trustworthy.

I think the arrangements entered into by the plaintiff's wife with the defendant, were partly at her suggestion and altogether with her concurrence: that the defendant acted throughout with the utmost fairness, and that his conduct in making the offer he did to the plaintiff on his return shewed that he was actuated only by a desire to do what was right.

The question, however, is, had the plaintiff's wife the authority of the plaintiff to make the arrangements she made with the defendant; and this depends upon the letter from the plaintiff to his wife above set out, and upon the construction to be put upon it; and in order to put a proper construction upon it, we must look upon it under the light of all the surrounding circumstances, and we must put ourselves, as it were, in the situation of the writer of the letter, in order to discover his object in writing it, and what meaning he intended to convey by the words used.

The facts that the plaintiff had done no summer fallowing on the demised premises, as he was bound by his lease to do, and that he had done no fall ploughing, both of which were essential to his beneficial use of the premises: that he exhibited no intention of reserving seed-grain to sow the premises the following year, but the contrary: that he started for Manitoba to look for land, which a man in his circumstances could have no object in obtaining if he intended to continue upon the demised premises for the residue of his term—lead me to conclude that when he went away he had made up his mind to abandon the demised premises.

His wife was, doubtless, aware of this his intention, as

she was of his intention to go to Manitoba, and, no doubt, the probability of his not returning was discussed between them.

He went away largely in debt, chiefly to the defendant, leaving, if enough, but little more than enough, to pay the rent.

Whether he had any intention when he went away of returning again or not may be doubtful, but I have no doubt that when he wrote the letter referred to from Meaford, he had then made up his mind not to return.

"Dear Polly," he says, "I am very sorry indeed. I suppose you think it strange I have not been home. But so many demands upon me at this time, I found I could not meet them. The first hint is I am gone across the water to Manitoba." I think the impression intended to be conveyed by these words, was, "I have gone to Manitoba, and I do not intend to come back on account of there being so many demands upon me which I cannot meet." His wife to whom the letter was sent understood this to be his meaning, and, I think, naturally and rightly so.

Then he adds: "As regards to Mr. Milligan's affairs, I wish you to do the best way you can." Now, what is the obvious meaning of these words addressed by the plaintiff, intending to abandon the demised premises, and going away intending not to return, to his wife, whom he has left in possession of the premises and of all the property he has left behind? It is, it seems to me, that she should make the best settlement she could with the defendant, and how was she to make a settlement with the defendant but with the property left in her possession, and by surrendering the term?

It is evident that the plaintiff, in using the words quoted, intended to convey by them the meaning that his wife was to *settle* with the defendant, because he says in his evidence: "Mr. Milligan had backed a note for me for some horses, and the note was not due at the time I went away, and there was another note for \$25. The money I left with my wife—\$165—for the purpose of paying these

when they came due. That is what I referred to in that letter, *settling* with Mr. Milligan."

It is clear, from the context of the letter, that the payment of these notes was not what was referred to in the letter; but the evidence is important as shewing that a *settling* was to be made.

I conclude that he intended to convey to his wife the authority to settle with the defendant the best way she could, and I think the arrangements she made with the defendant were within the scope of that authority.

The further expressions in the letter—"But tell Mr. Milligan not to be afraid of me, I will see him all right," and, "now if Mr. Milligan will do the thing that is square, that is all right; but I hope he will be a friend to you, and I will be the same to him,"—rather, in my opinion, support the view I have taken than otherwise; the former may well be referable to the balance that would remain due to the defendant after the settlement, and the latter to the defendant doing in the settlement the thing that was square.

There was a good surrender of the term by act and operation of law, if the wife had power to do what she did, and I think she had.

I think, therefore, that a verdict should be entered for the defendant in each case, and that the rules for that purpose should be made absolute.

I refer to *Shore v. Wilson*, 9 Cl. & Fin. 355; *Miell v. English*, 15 L. T. N. S. 249; *Church v. Landers*, 10 Wend. 79; *Butts v. Newton*, 29 Wis. 632; 1 *Bishop M. & D.* 559, 577; 2 *Bishop on Married Women*, 400, 414; *Ramsay v. Stafford*, 28 C. P. 229.

HAGARTY, C. J.—These cases were tried by me at Owen Sound. I felt much embarrassed at the trial as to the extent of the wife's authority. I finally entered verdicts in both the cases for the plaintiff.

I regret to say that I have been unable since the trial and argument to satisfy my mind on the point.

There is very little to guide us in the way of authority beyond the general principles governing the law of agency. I have been unable to find any case resembling this in its facts.

The whole authority of the wife rests on the letter in the evidence. I agree that we may read it by the light of all the surrounding circumstances. Still its construction must mainly, if not wholly, govern our decision.

Had the letter been simply a statement that he was going to a distant country, and directing his wife to make the best arrangement she could with his landlord, I would have had less doubt in my mind.

I find that my learned brothers are of opinion that the letter in effect bears this construction. I am very glad that they have been able to adopt this view.

What is meant by "Tell Mr. Milligan not to be afraid of me. I will see him all right. * * If Mr. Milligan will do the thing that is square that is all right; but I hope he will be a friend to you, and I will be the same to him?"

These expressions are consistent with a full intention of returning in two or three months, or the following spring. The plaintiff owed Milligan largely at the time, not merely for rent, but in other dealings, and Milligan was endorser for him to others.

The defendant has to shew that the letter authorized a surrender of a term of seven years, then in its first year, and a giving absolutely to him of the whole chattel property of his tenant to at least \$500.

The defendant gave up nothing of his large claim. Beyond agreeing to credit the plaintiff with the value ascertained by two persons, he gave up nothing. He was, of course, not bound to give up anything, but we might expect that, in dealing with the wife of his debtor whom he could (in his view) have never expected to see again, there would have been something allowed as equivalent for his thus getting everything, land and property, that her husband was known to possess.

We must all agree that the authority given by the letter is expressed in terms the reverse of clear and unambiguous.

A lawyer advising defendant could hardly express himself with perfect confidence as to its precise extent.

Defendant elects to act on the widest and fullest construction of the words used, and takes a formal surrender and transfer of the term and chattels.

While the property is still all in his possession and control, the plaintiff returns, after four or five weeks' absence, and at once refuses to sanction what his wife had done.

The defendant might then have replaced everything, and resorted promptly to his rights as landlord under the lease. He might have been liable to an action for what he had previously done, but the damages would be only nominal.

Then the defendant serves him with a copy of the document of November 15th. "Copy of the goods and chattels valued by Wm. Howey and Duncan Matheson as between Mr. and Mrs. Benjamin Wheeldon and J. Milligan: said goods are now all in the possession of said Milligan, *subject to the said B. Wheeldon, until Monday next, to be sold by public auction, if he prefers.* Also the clearing and buildings on the west half of lot 4, concession 6, &c., *is yet open for the said B. Wheeldon for the space of two months from this date, to enter and fulfil his agreement according to his lease thereof.*"

Of course it may be urged that defendant had made a completed bargain with the wife as plaintiff's authorized agent, and this offer to plaintiff was merely voluntary, and intended to extend indulgence to him.

We have to look at the whole transaction, a doubtfully worded authority, and the prompt return of the principal before any irreparable wrong or damage was done, and the action of defendant in giving this notice, and plaintiff's refusal to recognize what was done.

In the few cases in which a wife has, in her husband's absence, taken upon herself to deal with his property, leasehold or personal, there was generally some evidence derivable from long continued absence, and the presumption of the knowledge of, and acquiescence in, the acts of the wife.

It is difficult to have any sympathy for the plaintiff, even if such a feeling should find a place in the judicial mind, and we may be satisfied that the defendant intended to act fairly. But I have not been able to find, either as Judge or juror, that the wife in this case was clothed with legal authority to bind her husband by these sales and surrenders.

I am of opinion that it is not open to defendant, after all he did, to urge now that he has entered as for condition broken.

It is clear that a landlord may enter under one asserted right, and defend his entry under another. The law is plainly stated in *Phillips v. Whitsed*, 2 El. & El. 804. But he never entered here under any claim of right, or in the exercise of any right existing in himself. His entry was wholly under alleged contract and bargain with the wife, and the document of the 15th of November seems to me to admit the existence of the term, and to be wholly inconsistent with the position now claimed, that the term was gone by entry for condition broken.

Taking a formal surrender of a term from a tenant seems hardly consistent with the idea that it was already forfeited.

I am ready to concur in reducing the damages in the eviction suit to a nominal sum, as I believe the plaintiff was in that position that he never could have carried on the farm.

CAMERON, J., agreed with ARMOUR, J.

Rules absolute.

THE GREAT WESTERN RAILWAY COMPANY V. HODGSON.

Warehouse receipts—Who may give—Curers and packers of pork—Receipts for property wrongfully obtained—Admixture of property.

T. & T. delivered, subject to their order, some hogs to the plaintiffs, with a request to notify G. & Co. at Windsor. T. & T. transmitted the bills of lading to the Merchants' Bank at Windsor, which the bank on receiving payment from G. & Co., but not till then, were to endorse over to G. & Co. G. & Co., with knowledge of these facts, procured the plaintiffs' station agent at Windsor, on arrival of the hogs there, to deliver up the hogs to them, but on the express agreement that until they obtained a delivery order from T. & T. they would hold the same for the plaintiffs. G. & Co., who were curers and packers of pork, drew up a document purporting to be a warehouse receipt for hogs received in store from H. & Co., to be delivered to the order of H. & Co., who had no property stored with G. & Co., and without H. & Co.'s endorsement, enclosed the same to one D., the manager of the Bank of Montreal at Windsor, together with a draft on H. & Co. for \$5,000, with a request to have the same discounted, and to return to G. & Co. currency drafts for the amount thereof, to enable them to pay through the Merchants' Bank the price of the said hogs. The draft was discounted, but instead of returning the currency drafts, the manager wrongfully, and without any authority from G. & Co., applied the proceeds in payment of a previous advance made to G. & Co. on H. & Co.'s credit. G. & Co. killed the hogs and mixed the pork and lard made therefrom with other pork and lard in their factory. Subsequently G. & Co. delivered to the defendant, who was aware of its not having been paid for, the said pork and lard, together with other pork and lard, and so mixed as aforesaid as to be undistinguishable except by G. & Co. and their servants. The plaintiffs claimed the said pork and lard so made from the hogs obtained from the plaintiff, and issued writs of replevin therefor. At the time of the issue of these writs the pork continued so mixed with the other pork, and the sheriff, neither the defendant nor his servants giving him any assistance in distinguishing it, in executing the writs unavoidably took some pork not the produce of the plaintiffs' hogs, but left with defendant an equal quantity in amount and value of the plaintiffs' pork.

Held, that the plaintiffs were entitled to recover: that G. & Co. obtained no right or title to the hogs or the produce thereof as against the plaintiffs; and the defendant, having obtained possession with full notice of the plaintiffs' claim, acquired no better title than G. & Co. had.

Held, also, that nothing passed under the alleged warehouse receipt; that G. & Co. were not warehousemen or persons entitled to give warehouse receipts; and that the receipt itself had nothing to support it, for H. & Co. had no property stored with G. & Co., and it was proved that the property for which the alleged warehouse receipt was given was held by G. & Co. on a special bailment which precluded their giving warehouse receipts therefor; and further, it appeared from the evidence that the warehouse receipt was received under agreement between G. & Co. and D., which D. did not fulfil, and that no property therein or in the said hogs vested in said bank.

Held, also, that neither G. & Co. nor defendant could set up G. & Co.'s wrongful mixture and confounding of the property in order to defeat the plaintiffs' right to recover.

THIS was an action of replevin brought for a quantity of pork made from certain hogs delivered by Messrs. Teufel & Thompson of Chicago to the plaintiffs, to be carried to Windsor, Ont., subject to the order of Messrs. Teufel & Thompson, and to notify Messrs. Girdlestone & Co., tried before Gwynne, J., without a jury, at Sandwich, at the Fall Assizes of 1878.

There was a similar action in the Common Pleas for a quantity of lard made from the same hogs, and the same evidence applied to both.

The pleadings and evidence, so far as material, are set out in the judgment of the learned Judge given at the trial, which was as follows :—

“To these actions of replevin, one in the Court of Queen's Bench, and the other in the Court of Common Pleas, the defendant pleads two pleas, viz., not guilty ; and a plea, not asserting property in himself, and denying the right of the plaintiffs, as is usual in pleas of replevin raising the question of title, but simply as in trespass or trover, denying the plaintiffs' property. The actions, however, being replevin, I may, I think, treat the plea as if in that form, as is usual in replevin ; for otherwise, if there should be a verdict for the defendant, he could have no judgment for a return ; and in fact the contention of the defendant is that the hogs were his absolute property ; and that of the plaintiffs, that he had no property in them, and that they had the right of possession of them.

“I find, as matter of fact, that the hogs in question were at the time they came into the possession of the defendant, and when the writs of replevin in these cases issued, the absolute property of Messrs. Teufel & Thompson, trading together in partnership at Chicago, in the State of Illinois, who, upon the 17th January, 1878, caused some of the hogs, and upon the 18th January, the residue of them, to be delivered to the plaintiffs, to be kept by them, subject to the order of the said Messrs. Teufel & Thompson, with an intimation accompanying such bailment that they should notify Messrs. Girdlestone & Co.; and I find that neither by contract or otherwise did the said Messrs. Teufel & Thompson ever sell or transfer their property in or right of possession to the said hogs to Messrs. Girdlestone & Co.

“I find that the hogs were consigned to the plaintiffs, who received them as above, deliverable only upon the order of Messrs. Teufel & Thompson ; and I find the course of dealing of Messrs. Teufel & Thompson transmitted to the Merchants' Bank, Windsor, the bills of lading for the hogs, who as agents of Messrs. Teufel &

Thompson had authority, upon receiving payment from Messrs. Girdlestone & Co. for the hogs, to endorse the bills of lading to them, and to authorize them to receive the hogs from the Great Western Railway Company; and I find, that unless or until Messrs. Girdlestone & Co. should pay to the Merchants' Bank upon account of Messrs. Teufel & Thompson the price of the said hogs, the amount of which was communicated to them by Messrs. Teufel & Thompson, they, the said Messrs Girdlestone & Co., had not, nor was it intended that they should have, any right to or property in the said hogs, or any right to the possession of them. And I find that Messrs. Girdlestone & Co., with full knowledge that they had not and were not intended to have any right to or property in the said hogs, procured the station agent of the Great Western Railway Company at Windsor, (who so as aforesaid held the said hogs for and on account of the said Messrs. Teufel & Thompson, and as bailees to deliver them up on the order of Messrs. Teufel & Thompson), to place the said hogs in possession of Messrs. Girdlestone & Co., upon the express agreement and promise made by them that they would hold the said hogs under and for the Great Western Railway Company, (whom Messrs. Girdlestone & Co. well knew to be such bailees as aforesaid), until they, the said Messrs Girdlestone & Co., should deliver to the said Great Western Railway Company a delivery order signed by the said Messrs. Teufel & Thompson, or by some person duly authorized in that behalf, authorizing the delivery of the hogs to them, Messrs. Girdlestone & Co.; and that upon the faith of this agreement and promise, and not otherwise, the said hogs were delivered into the possession of Messrs. Girdlestone & Co. by the station agent of the Great Western Railway Company at Windsor. And I find, that the said Messrs. Girdlestone & Co., at the time of their so getting possession of the said hogs, well knew that the said station agent was, in so placing them in the possession of the said hogs, exceeding the authority vested in him as agent of the said Great Western Railway Company; and so I find that the said Messrs. Girdlestone & Co. did not by such possession acquire any property whatever in the said hogs, but that they held them solely as agents of and for the said Great Western Railway Company, in virtue of the agreement and promise by which they acquired such possession, and that the property in said hogs remained still in the said Messrs. Teufel & Thompson.

“And I find, that the said Messrs. Girdlestone & Co., having so obtained possession of the said hogs, killed the same—they, the said Messrs. Girdlestone & Co., being curers and packers of pork—and mixed the pieces cut from the said hogs with other pork which they had then in their curing and packing factory at Windsor; and upon the 19th January, 1878, they, the said Messrs. Girdlestone & Co., although not being warehousemen within the meaning of that term, as used in the Act to amend

the mercantile law, ch. 116, of the Revised Statutes of Ontario, or in the Act relating to banks and banking, 34 Vic. ch. 5, D., and although they had not received the said hogs, or any hogs, from Messrs. A. Hodgson & Sons, or from any person or persons whomsoever, deliverable to the order of Messrs. Hodgson & Sons, nevertheless they prepared and signed a paper in the words following :—

“‘WAREHOUSE RECEIPT.

“‘Received into store from Messrs. A. Hodgson & Sons, six hundred and fifty hogs, to be delivered pursuant to their order endorsed hereon, and on production of this receipt only.

“‘This is to be regarded as a receipt under the provisions of statute 34 Vic. ch. 5, entitled “An Act relating to banks and banking,” and the subsequent amendments thereto.

“‘GIRDLESTONE, ORRIS & Co.,

“‘Windsor, Ont., January 19, 1878.

Warehousemen.”

“And I find, that on the same 19th January, 1878, the said Messrs. Girdlestone & Co. enclosed the said paper writing so prepared and signed, without any endorsement whatever thereon, in a letter addressed and sent to F. A. Despard, Esq., who was the manager of the Bank of Montreal, London, which letter is as follows :—

“‘DEAR SIR,

“‘Enclosed we beg to hand you receipt and draft on Messrs. A. Hodgson & Sons at thirty days sight for \$5,000, proceeds of which please place at our credit. Also send us by return mail currency drafts for \$2,818.69 and \$1,989.85, and wire Merchant's Bank here that you have done so, and oblige

“‘Yours faithfully,

“‘GIRDLESTONE, ORRIS & Co.’

“And I find that the object of the said Messrs. Girdlestone & Co. in so forwarding such receipts to Mr. Despard, was for the purpose of obtaining the currency drafts required by the letter to be forwarded, for the purpose of paying through the Merchants' Bank the price of the said hogs, which had been so in manner aforesaid delivered by the Great Western Railway Company to them, the said Messrs. Girdlestone & Co., in order that they might obtain from the Merchants Bank, as the agents of Messrs. Teufel & Thompson, the delivery order for the hogs, to be handed to the Great Western Railway Company in discharge of the agreement and promise of them, the said Messrs. Girdlestone & Co., upon the faith of which they had so as aforesaid received the said hogs.

“And I find, that the said F. A. Despard received the said draft under the circumstances, and that he discounted the same, but that, instead of applying the proceeds as directed by the said

Messrs. Girdlestone & Co., he applied the same in payment to the Bank of Montreal of a sum of \$5,600 which the said F. A. Despard, as manager of the said Bank at London, had advanced to the said Messrs. Girdlestone & Co. some time previously, upon the credit of the said Messrs. Hodgson. And I find, that the said Mr. Despard, upon the 21st January, communicated to Messrs. Girdlestone & Co. such his application of the said draft in a telegram in the words following :

“ ‘January 21st, 1878. By telegraph from London.

“ ‘To GIRDLESTONE, ORRIS & Co.

“ ‘Enclosure of Saturday received and credited. Through oversight the five thousand gold placed Hodgins’s credit in December not charged you until this morning. Account somewhat overdrawn in consequence. Cannot wire Merchants’ Bank as requested. No letter from Angus. May receive instructions by noon mail.

“ ‘F. A. DESPARD.’

“ And I find that upon receipt of this telegram the said Messrs. Girdlestone & Co. telegraphed the said Mr. Despard not to send the draft on for acceptance unless he should give to them, the said Messrs. Girdlestone & Co., the proceeds : that the hogs were in, and that they must have the money to pay for them. To which the said Mr. Despard replied by telegram that the draft had gone forward for acceptance ; and I find, that notwithstanding the said Mr. Despard did not, nor did the said Bank of Montreal, supply the said Messrs. Girdlestone & Co. with the funds they required to pay for the hogs, and to obtain which alone they had placed the said draft and the said paper purporting to be a warehouse receipt in the hands of the said Mr. Despard. And I find, that the said Mr. Despard in so dealing with the said draft and paper writing purporting to be a warehouse receipt, did so wrongfully and without the authority of the said Messrs. Girdlestone & Co.

“ And I find that neither the said draft nor paper purporting to be a warehouse receipt came into the possession of the Bank of Montreal, or of the said Mr. Despard, as their agent, under or in pursuance of the provisions of the Act relating to banks and banking, 34 Vic. ch. 5, D., notwithstanding anything appearing upon the said paper purporting to be such warehouse receipt ; and that under the circumstances in which the same did come into the possession of the said bank, and of the said Mr. Despard, the said bank never had vested in them any right or title to the hogs mentioned in said paper writing.

“ My reasons for this last finding are :—

“ 1. That Messrs. Girdlestone & Co. were not warehousemen or persons who, as such, could give a warehouse receipt. See

Ontario Bank v. Newton, 19 C. P. 258 ; *Bank of British North America v. Clarkson*, 19 C. P. 182, and *Todd v. Liverpool and London, &c., Ins. Co.*, in Appeal, 20 C. P. 523.

"2. They were curers and packers of pork, but they do not come within the provisions of the Act to amend the Mercantile Law, Revised Statutes of Ontario, ch. 116 ; and moreover, that statute transfers the property in such things as do come within the Act by endorsement by the persons holding a warehouse receipt, and this warehouse receipt, appearing on its face to be the property of Messrs. Hodgson & Son, is not endorsed by them, or by any one in fact for them.

"The Act does not authorize a person who is a warehouseman, who gives to another person a warehouse receipt as for property received in store or warehouse from such person when in fact nothing has been received, to transfer to such other person the right and title to property which such warehouseman received upon special bailment from another, and not in his capacity of warehouseman at all. *A fortiori*, a person, not a warehouseman, having possession of A's property under a special bailment can not by giving to C a warehouse receipt, as for property received from C, nothing being in fact received, transfer A's property to C.

"3. The statute does not authorize a bank to acquire any interest in A's property, stored in a warehouse, by the warehouseman for his purposes depositing with the bank a warehouse receipt which upon its face shews the property to be A's and not the warehouseman's own property.

"4. The bank did not fulfil the terms and conditions upon which the draft and warehouse receipt was placed in their hands : that is to say, they did not supply Girdlestone & Co. with the currency drafts required by them. The bank therefore, having violated the terms of the bailment, could acquire no right or title to own the thing bailed.

"5. 'Curers and packers of pork' do not appear to be within the 46th and 47th sections of 34 Vic. ch. 5, D. They are only named in the 48th section, which provides for the case of the warehouseman and other persons there named being themselves the owners of the goods named in the receipt or certificate. A receipt therefore given by a curer and packer of pork can, as it seems, be only valid in the case where the curer and packer is also himself the owner of the hogs or pork. Now here, not only is the receipt not given by Girdlestone & Co. in the character which they possess, namely, that of curers and packers of pork, but in a character which they do not possess, viz., warehousemen ; and the receipt, so far from asserting or shewing title in Messrs. Girdlestone & Co. in the hogs named in the receipt, states them to be the property of Hodgson, and as such to have been received by Messrs. Girdlestone & Co., and not in their character of curers

and packers of pork, which they were, but in the character of warehousemen, which they were not.

“But, independently of these objections, I find further, as matter of fact, that, notwithstanding any thing appearing in the paper called a warehouse receipt, the Bank of Montreal did not receive, nor was it ever intended they should receive, the said paper purporting to be a warehouse receipt so as to vest any property therein, or in the hogs mentioned therein, or at all, as bankers, in virtue of or under the provisions of the Act relating to banks and bankers, but that the said Mr. Despard, being agent of the Bank of Montreal, received the same solely as agent of the defendant in this replevin, in pursuance of a special arrangement made by and between him and the said Mr. Despard, acting as agent and manager of the Bank of Montreal, and Messrs. Girdlestone & Co., for the purpose of enabling Messrs. Girdlestone & Co. to carry on the business of curers and packers of pork, which agreement was contained in a letter addressed and sent to and received by the said Despard in the terms following :—

“ ‘NEW YORK, October 31st, 1877.

“ ‘F. A. DESPARD, Esq.,

“ ‘Manager Bank of Montreal, London.

“ ‘DEAR SIR,

“ ‘We write to advise fully of details of arrangement made between Messrs. Girdlestone, Orris & Co. of Windsor and ourselves. We have agreed with them, and do hereby state to you, that we will honour their drafts on us at 30 days sight up to about \$15,000 weekly for three or four consecutive weeks, or running at one time, say about \$50,000 to \$60,000, on the following arranged conditions :

“ ‘They, Messrs. G. O. & Co. in every instance where making draft on us to put you in possession of warehouse receipts for hogs, against which drafts are made at time of their making draft.

“ ‘They also agree to place with you fire insurance policies covering said hogs while in process of cure ; also further, they, Messrs. G. O. & Co., agree to place with you, in trust for us, collateral security, fully worth \$10,000, and to be kept good full value for any or all reclamations of any kind that may become due us from them, until such arrangements as now are made are cancelled and we fully reimbursed for any claims against them, and the security released by us.

“ ‘Their drafts on us are to be made in weekly total amounts, (though not in one draft, necessarily,) of about \$15,000 per week.

“ ‘Very respectfully,

“ ‘ABRM. HODGSON & SONS.’ ”

"And I find, as matter of fact, that the said Messrs. Girdlestone & Co., without ever having paid for the said hogs, and without having acquired the property therein, and without ever having obtained a delivery order in their favor for the same, upon the 26th January delivered the pork and lard made from the said hogs in manner and upon the terms aforesaid placed in their possession upon the 17th and 18th January, 1878, by the agent of the Great Western Railway Company, unto the defendant, together with a large quantity of other pork and lard in the curing and packing factory of them, the said Messrs. Girdlestone & Co. so mixed up that it was impossible for any one except the said Messrs. Girdlestone & Co., or their servants, to distinguish with certainty the pork and lard made from the hogs received on the 17th and 18th January. And I find, that at the time of such delivery by the said Messrs. Girdlestone & Co. to the defendants, the said Messrs. Girdlestone & Co. had in fact acquired no right or title to the pork or lard made from the said hogs so received upon the 17th and 18th January, and that the defendants well knew that they had not been paid for. And I find that the said defendant after such delivery to them kept the said pork and lard, so as aforesaid made from the said hogs, and mixed up with the other pork and lard in the factory delivered them to the defendant until the plaintiffs procured the writs of replevin issued in these suits to be executed.

"And I find, that neither the defendant nor his servants in possession of the said pork and lard gave to the plaintiffs, or the sheriff executing the writ, any assistance in distinguishing the pork and lard made from the hogs so as aforesaid received by Messrs. Girdlestone & Co. upon the 17th and 18th January, from the other pork and lard, although all the pork and lard so made from the said hogs was then in the said factory in the possession of the defendant.

"And I find that the said sheriff in executing the said writ did distinguish, as well as it was possible for him to do, the pork and lard made from the hogs so as aforesaid placed in the possession of Messrs. Girdlestone & Co. upon the 17th and 18th January, but that in so doing he did, unavoidably, take some pork and lard not made from said hogs, but in the place and stead of which the defendants retained and received pork and lard made from the said hogs so as aforesaid placed in the possession of Messrs. Girdlestone & Co. upon the 17th and 18th January, to an equal extent and value.

"From the evidence, it is difficult to say whether the sheriff may not have taken about 2,000 pounds more of weight of pork than may have possibly been in fact made from the said hogs of 17th and 18th January, but the evidence, I think, shews that he took much less lard than may have been made from the hogs.

"I think, however, under the circumstances, if the defendant had merely claimed for an excessive taking, instead of insisting upon a right to the whole, he should have removed all doubt as to whether the taking was excessive, which he did not attempt to do ; and as I think the plaintiffs only took what they reasonably believed to be the very produce of these hogs, doing nothing vexatiously, and as I proceed upon the basis of finding that the defendant and Messrs. Girdlestone & Co. were guilty of a wrongful conversion of these hogs, which were the property of Teufel & Thompson throughout, and were in possession of the plaintiffs as bailees, from whose possession they came into the hands of Messrs. Girdlestone & Co. upon special bailment under the plaintiffs, and that the defendant when he received possession of the hogs, which possession he has continually insisted upon as vesting the property in him, was aware that the hogs had not been paid for, I do not think that I am called upon to make any nice distinction as to the weights taken, but that the defendant should have the burthen, if it be a fact, which I cannot say has been clearly established before me, and which was in no respect the ground upon which the actions were resisted.

"Upon the whole, therefore, for the above reasons given in detail, I find in each case a verdict for the plaintiffs with \$5.00 damages, in the Queen's Bench for the pork, and in the Common Pleas for the lard. I may add, as a fact which was also proved in the case, that shortly after action commenced, the plaintiffs Teufel & Thompson for value have assigned to the plaintiffs the right and title absolutely to the hogs and their proceeds.

"Verdict for the plaintiffs in the Queen's Bench case, and \$5 damages.

"Verdict for the plaintiffs in Common Pleas case, and \$5 damages.

"Certificate granted for full costs.

"If the defendant's point were, that he was entitled to recover at any rate for the pork proved not to have been the produce of the particular hogs, that would, as it appears to me, be a technical objection, for by the cases cited in *R. & J.'s Digest*, Replevin, Damages, p. 3307-8, it appears a plaintiff is entitled to recover damages for property proved to be in the defendant's possession at the time of the execution of the writ of replevin, although not replevied, when he replevies a part. So here, the plaintiffs having undoubtedly replevied some pork which was the produce of the particular hogs, would be entitled to damages for the rest, and to the full value of the other pork replevied ; so that, if the defendant were entitled to a verdict here for part of the pork seized, as not having been part of the produce of the particular

hogs, he would be subject to a verdict in damages for the value of the rest of the produce of those hogs which was in defendant's hands, and subsequently sold by him. This right to damages for goods in a defendant's hands, repleviable, but not replevied, suggests the view in these cases which determine that under a writ of replevin, where defendant's goods of the same nature are mixed up with the plaintiffs' goods wrongfully taken or detained, the plaintiffs may replevy goods of the defendant of the like nature and value of the goods of the plaintiffs, so wrongfully mixed with defendant's goods."

In Michaelmas Term, November 23, 1878, *McMahon*, Q.C., obtained a rule *nisi* to set aside the verdict for the plaintiffs, and to enter a verdict for the defendant.

In this Term, 11th February, 1879, *Robinson*, Q. C., shewed cause.

McMahon, Q. C., contra.

The arguments and cases cited sufficiently appear from the judgments of the learned Judge at the trial and of this Court.

March 8, 1879. HAGARTY, C. J.—An examination of the evidence and papers in this case leads me to the opinion that the learned Judge who tried this case has arrived at the right conclusion in finding for the plaintiffs.

His most carefully prepared judgment very fairly states the facts of the case. It is not necessary to go over the same ground.

I agree that Girdlestone & Co. obtained no title to or right of property in the hogs as against the plaintiffs; that they held them for the plaintiffs up to the time of the defendant Hodgson coming up and taking possession; and that when he so took possession he did so with full notice of the plaintiffs' claim, and that he acquired no better right than Girdlestone & Co. had.

I fully agree that no property passed by the alleged warehouse receipt either to the Bank or to the defendant. There was nothing to support it, and it was false in fact. Neither the defendant, nor any one for him, had stored any of that property with Girdlestone & Co.

Nothing had occurred to enable Girdlestone & Co., to give the defendant or the bank any better title than they had themselves.

The chief difficulty in the plaintiffs' way in this replevin suit was from the admixture of these hogs, after being slaughtered, with other pork in the stores. But I think the learned Judge has drawn the right conclusions of fact from the evidence on this head.

Looking on Girdlestone & Co. as having tortiously mixed the plaintiffs' property with their own, and the defendant as in no better position than they were, I adhere to the views I expressed in *Coffey v. Quebec Bank*, 20 C. P. 110. Mr. Justice Gwynne decided that case on a different ground, but he inclined to adopt the views expressed on the admixture question.

We are not dealing here with the case of some innocent party, who in the course of business has become interested in property with which the plaintiffs' property has been mixed so as to be undistinguishable.

I think Girdlestone & Co. could not set up their own wrongful mixture and confounding of the property to the defeating of the plaintiffs' right to replevy their own; and as I cannot see that the defendant has acquired any higher right, it seems to me that it does not lie in his mouth to say that the plaintiffs must execute their writ wholly at their own peril, and if the defendant, having power so to do, decline or omit to distinguish what is the plaintiffs' from other property, a jury may be warranted in holding that what the sheriff here seized was the right property. No more in value was seized than the writ called for.

It was conceded that a large portion of what was seized was the identical property claimed. The evidence was anything but clear as to the residue.

I think therefore the verdict was rightly entered for the plaintiffs for the whole.

The principles governing cases as to the mixture of property with other property of a like description, are discussed by Lord Eldon in *Lupton v. White*, 15 Ves. 432, 438,

and in notes of *Sumner's* edition. The onus of distinguishing the plaintiffs' property from others would be thrown on those causing the confusion. I refer to this judgment instead of citing the cases.

I may also refer to an American work, *Morris* on Replevin, p. 90, and (amongst others) to a case of *Henderson v. Lauck*, 21 Penn. 359, where the right of a party to replevy his goods, wrongfully mixed with like goods, is maintained.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

MEMORANDA.

During Hilary Term the following gentlemen were called to the Bar:—

WILLIAM EGERTON PERDUE, ELGIN SCHOFF, JAMES HAVERSON, JOHN COWAN, ERNEST HENRY EDEN EDDIS, EDWARD SYDNEY SMITH, JOHN GILBERT GORDON, JOSEPH ALFRED WRIGHT, CHESTER GLASS, PETER VANCES GEORGEN, JAMES PEARSON, JOHN BISHOP, FREDERICK WILLIAM BARRETT, THOMAS WILLIAM HOWARD, DANIEL BAYARDE DINGMAN, JOHN INKERMEN MACCRACKEN, JAMES DOWDALL, JOHN HODGINS, REGINALD GOURLAY, JOHN MACGREGOR, WILLIAM JEX, CHARLES McMICHAEL.

SITTINGS IN VACATION

AFTER HILARY TERM, 1879.

IN RE RUSH AND THE CORPORATION OF THE VILLAGE OF BOBCAYGEON.

Appeal to Quarter Sessions—Order as to costs—Mandamus.

Under 32 & 33 Vic. ch. 31, secs. 65, 74, D., the Court of Quarter Sessions at which an appeal is heard must determine, on quashing a conviction, whether any and what costs are to be paid, and when.

Where, therefore, the only order made was, "Conviction quashed with costs":

Held, that no subsequent Session of the Court could interfere by way of amendment of the order or otherwise, and a rule for a *mandamus* to the chairman and clerk of the Sessions to issue the said order, with a provision for payment by the respondents to the appellant of the costs of the appeal forthwith after taxation, was discharged, but under the circumstances without costs.

February 18th, 1879, *Marsh*, on behalf of the appellant, Thomas Bush, obtained a rule *nisi* calling on the chairman and Clerk of the General Sessions of the Peace for the County of Victoria, to shew cause why a writ of *Mandamus* should not be issued, commanding the said chairman or clerk, or one of them, to issue, or cause to be issued, the order made at the sittings of General Sessions of the Peace, held in the month of June last, of which order the following minute had been made in the book kept for that purpose by the said clerk, viz.: "Conviction quashed with costs;" and why said order should not provide for the payment to the said appellant by the said respondents of the costs of such appeal forthwith after taxation thereof.

It appeared that at the June sittings of the said General Sessions for the County of Victoria, which lasted from the eleventh to the fifteenth day of June, George Dennistoun, Esquire, Judge of the County Court of Peterborough, acted as Chairman of the Court in the place of Judge Dean,

Judge of the County Court of the County of Victoria, and while he was so sitting the matter of the said appeal came on to be heard, and after hearing the conviction was ordered to be quashed with costs. No formal order was then drawn up. No time was fixed for the payment of costs, nor person named to whom or by whom the costs should be paid, and the costs were not taxed. At the following sitting of the Court application was made to Judge Dean, then presiding as Chairman of the General Sessions, and to A. P. Devlin, Esquire, Clerk of the Peace, to issue the order. They refused, on the ground that at a subsequent sitting of the Court they had no power in an appeal to issue an order for payment of costs awarded at a former session of the Court, and if such order could be issued, no time having been fixed by the previous judgment, or person named to whom or by whom the costs were to be paid, no amendment in these respects could now be made. Application was then made to Judge Dennistoun, who declined to interfere on the ground that he was *functus officio*.

February, 28th 1879, *A. P. Devlin*, shewed cause on behalf of the corporation of Bobcaygeon, Judge Dean, and himself, as Clerk of the Peace for the county of Victoria, and contended that under section 74 of ch. 31 of 32-33 Vic., D. the Court at which the appeal was heard should have fixed the amount of costs, determined the time of payment, and the person by whom and to whom the costs should be paid, and not having done so, the Judge of the Court of General Sessions, and the Clerk of the Peace, could not amend the judgment, or legally issue the order asked for. He referred, in support of his contention, to *Pritchard's Quarter Sessions*, pages 28, 69, 694-5-8-700-1; *Rex v. Cockfield*, 2 Salk 477; *Regina v. Hellier*, 15 Jur. 901; *Regina v. Murray*, 27 U. C. R. 134; *Regina v. Belton*, 11 Q. B. 379; *In re Foster and Great Western R. W. Co.*, 32 U. C. R. 506.

Marsh, contra, contended that the judgment of the previous Court of General Sessions was completed: that the Court is a Court of record, and a minute of the decision

having been duly made, the Clerk of the Peace, as Clerk of the Court, could at any time make up the formal record: that no time having been mentioned for the payment of costs, they became payable forthwith, and the order should so provide: that the statute determined to whom the costs should be paid, and the order should in this respect conform to the statute; and as no other directions could be given by the Court, it was unnecessary for the Court in quashing to name the person to whom the costs should be paid: that the Court awards costs, but does not tax them; that is the duty of the Clerk of the Peace, and can be, as a ministerial duty, performed at any time after the decision has been given, before the order of the Court is drawn up.

March 18th, 1879. CAMERON, J.—By section 65 of 32-33 Vic. ch. 31, D., the Court to which an appeal is made, shall thereupon hear and determine the matter of appeal, and make such order therein, with or without costs to either party, as to the Court seems meet; and by section 74, “If, upon any appeal, the Court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the Clerk of the Peace, or other proper officer of the Court, to be by him paid over to the party entitled to the same, and shall state within what time the costs shall be paid.”

It seems clear from these provisions, the Court of Quarter Sessions at which the appeal is heard must determine, on quashing a conviction, whether costs are to be paid; secondly, what costs, that is, costs of the Court below, or magistrate's Court, or costs of the appeal, or both, and when such costs should be paid. The Clerk of the Peace may tax the costs at any time during the then sitting of the Sessions, or at any adjourned sitting thereof; but it would seem clear, upon the authorities, the Court must adopt his taxation, and that an order made without such adoption would be invalid. If the Court give the proper judgment, so that nothing remains to be done except the

issuing of the order, that, as a ministerial act, may be done by the Clerk of the Peace after the close of the Session, and tested of the first day of the Session, but no subsequent session of the Court can interfere with the judgment of the previous session by way of amendment or otherwise.

The rule for a mandamus in this matter must therefore be discharged ; but, as Mr. Devlin appeared for the Corporation of the village of Bobcaygeon, as well as for himself and the learned Judge of the County Court, I shall discharge it without costs. The subject of the original prosecution does not appear by the papers before me, and I know nothing of the merits more than that it would seem a prosecution at the instance of the village corporation was instituted against the present applicant for the writ of Mandamus : that he was convicted and appealed against the conviction, and on the hearing of the appeal the Court, presided over by an able Judge, quashed the conviction, intending that the appellant should have the costs he had been put to by a conviction which I must hold, in deference to the Court that quashed it, to have been both illegal and unjust. Thus it would appear, a public corporation, though no doubt acting in the full belief it was right, vexed and oppressed the appellant by a prosecution of him, and ought without hesitation to have paid his costs, when in law it was held to have been wrong, and so carried out the intention of the Court in awarding costs, and not sheltered itself from a just responsibility under the error committed, which was only technical, as the substantial part was the quashing of the conviction with costs. These public corporations should feel it a duty to maintain and uphold the law, though its decree should be contrary to their own view of what is right. I cannot, therefore, exercise the discretion which rests in the Court of giving or withholding costs in favour of the corporation, which ought to have ascertained what the costs were and paid them, instead of compelling the applicant to seek this remedy to secure his right, and, as it turns out, incur considerably greater expense through its having proved abortive.

I refer to *In re Delaney v. McNabb*, 21 C. P. 563 ; *Rawnsley v. Hutchinson*, L. R. 6 Q. B. 305 ; *Sellwood v. Mount*, 1 Q. B. 726 ; *Regina v. Long*, 1 Q. B. 740 ; *Freeman v. Read*, 9 C. B. N. S. 301.

Rule discharged.

IN RE GRAND JUNCTION RAILWAY COMPANY AND MASSON.

Award—Time for moving against—Railway Act—R. S. O. ch. 165, sec. 20, sub-sec. 19.

An award against a Railway Company under the Railway Act, R. S. O. ch. 165, for land taken, was made on the 15th January, and a copy of the award served on the secretary on the 22nd. On the 18th February, a rule *nisi* was obtained to set aside the award, the only material filed upon the motion being a copy of the award and an affidavit, merely stating what one of the arbitrators had informed the secretary of the Company were the items constituting the sum awarded, but the evidence given before the arbitrators was not brought before the Court until the 7th of March, when the claimant in shewing cause produced what he stated to be the evidence.

Held, that the application was not an appeal under R. S. O. ch. 165, sec. 20, sub-sec. 19, there being no evidence brought before the Judge to enable him to decide any question of fact, but the ordinary application to set aside an award, and that as such it was too late, the time for so doing having expired on 15th February, the last day of the Term following the award.

Quere, whether service of a copy of the award was a sufficient notice thereof, under said sub-sec. 19 ; but *Held*, that even if so, the only evidence of what took place before the arbitrators not having been produced in Court for more than a month after such notice, the time allowed for *appealing* had expired.

February 18, 1879, *Hector Cameron*, Q. C., obtained a rule *nisi*, upon reading the affidavit of David Brow Robertson, filed, and a copy of the award thereto annexed, made between the parties, calling upon the claimant, Thomas W. S. Masson, to shew cause why the award made by the arbitrators on the fifteenth day of January, 1879, should not be

set aside, with costs to be paid by the said claimant, on the ground that the award was illegal, and excessive in amount, and awarded several sums for damages which were not legal or valid matters for compensation; or why the amount awarded should not be reduced, on grounds disclosed in affidavits and papers filed.

The affidavit of David Brow Robertson, referred to in the rule, and the only affidavit filed on the application, set out that he was secretary of the Grand Junction Railway Company, and caused the claimant to be served with the proper notice required by the statute, and the sum named in the notice was \$400 for the claimant's compensation for his lands taken by the said railway, in the township of Seymour, and for damages: that A. F. Wood, W. W. Boice, and his Honour Judge Clark, were the arbitrators: that the arbitration was held on the 15th day of January, 1879, at which he acted as solicitor for the company: that an award was made the same day, and the copy of award annexed to the affidavit was served on him on the 22nd day of January, by Stewart Masson, son of the claimant: that he was informed the amount of the award had been arrived at in the following manner,—for a new lane required owing to the course of the railway, \$50; for the land itself, \$200; for the use thereof for four years, \$50; for extra insurance on barns, \$100, and for further damages, \$260.

The award was, as far as material, as follows: "We award and adjudge that the compensation to be paid for the said land, and for the damages sustained by the owner thereof, in consequence of the said land being taken by the Grand Junction Railway Company, be, and the same is, hereby fixed at \$650, which sum includes \$100 allowed for the risk to be borne by the owner against loss of his barns and sheds south of the railway track, by fire being thereafter communicated thereto from the locomotives which may be used on the track of the Grand Junction Railway."

March 7th, 1879, *James Masson* shewed cause, and ob-

jected that the application had been made too late: that the motion should have been made before the 15th February, the end of the Term following the making of the award, and that the month allowed for appealing against an award under sec. 20, sub-sec. 19, of ch. 165, R. S. O., had no reference to applications to set aside an award, which applications must be governed by the practice in force before the passing of 38 Vic. ch. 15, O., as shewn by sub-sec. 21 of said section 20, ch. 165, R. S. O., which declared that the right of appeal given by that Act should not affect the *existing law or practice* as to setting aside awards. He also objected that the Grand Junction Railway Company had no corporate existence: that its charter expired before the passing of the British North America Act, 1867; and that the Dominion Act 33 Vic. ch. 53, was *ultra vires*, the Grand Junction Railway being a local work wholly within the Province of Ontario.

Hector Cameron, Q. C., contra. An application to set aside an award is an appeal, and the manner of appealing is not prescribed. There is now no appeal from a decision of a Judge of the County Court to this Court; and the practice in such appeals is no longer applicable, and the directions in sub-section 21 of section 20 of the above Act cannot be followed.

March 18, 1879. CAMERON, J.—I think the contention of the claimant is entitled to prevail, on the ground that the application is too late. Nothing, on moving the rule, was brought before the Court except an alleged copy of the award, and an affidavit setting forth what one of the arbitrators had informed the secretary of the company were the items going to make up the total of the sum awarded, clearly showing that the motion was made not by way of an appeal, but under the old and ordinary practice of attacking an award by application to set it aside, and no material was brought before the Court upon which it could determine the question upon the merits; and by sub-section 19 of section 20, ch. 165, R. S. O., it is the duty of

the Judge to decide any question of fact upon the evidence as in a case of original jurisdiction. To enable him to do this, the party objecting to the award must bring the material before him on which his judgment is to be based. Were it not that the claimant in shewing cause brought before the Court what he stated to be evidence given before the arbitrators, there would be nothing whatever to shew what was the evidence on which the arbitrators based their award. But while producing that evidence the claimant took the objection that it was too late for the Court to consider it. The time for moving against the award expired on the 15th day of February; the motion to set it aside was made on the 18th of February; notice of the award was given to the company by the service of a copy of it on the secretary, on the 22nd day of January, and the evidence was produced in Court on the 7th day of March, more than a month after notice of the award was had by the company, and so after the time allowed for appealing by said sub-section 19 of section 20, ch. 165, R. S. O., if the notice given by service of a copy of the award is equivalent to "*written notice from one of the arbitrators*," as to which I express no opinion.

Nor do I say anything upon the merits, as for the reasons above stated I do not think the material on which to base an opinion is properly before me. The rule must therefore be discharged, but without costs, as there seems to be doubt in the minds of the profession as to the shape in which an appeal should be made, and the claimant, by his objection, precludes me from considering the application on the merits as disclosed by the evidence; and also without prejudice to an appeal, should the company be advised that the notice they have had of the award, is not such a notice as precludes them from now appealing. With reference to the point that the company has no corporate existence, the Act of the Legislature of Ontario, 37 Vic. ch. 43, consolidating the several Acts relating to the company, is the best answer that can be given to this objection.

Rule discharged, without costs.

IN RE SURROGATE COURT OF WENTWORTH AND KERR.

Mercantile firm—Deceased partner—Probate fees under Surrogate Court Act, R. S. O., ch. 46.

For the purpose of taking out probate and paying the fees thereon, the representative of a deceased partner in a mercantile firm must be taken to be interested in the corpus of the partnership effects to the extent of the share of the deceased, undiminished by the debts and liabilities of the firm.

March 7th, 1879. *J. K. Kerr*, Q. C., obtained a rule *nisi*, upon reading the affidavit of George Laidlaw Papps and papers filed, calling upon the Registrar of the Surrogate Court of the county of Wentworth, to shew cause why a writ of mandamus should not be issued, commanding him to issue and deliver to Catharine Elizabeth Kerr, executrix named in the last will and testament of Thomas Cockburn Kerr, deceased, probate of the said will, for which the Judge of the Surrogate Court of the county of Wentworth had granted his fiat, upon payment to the said Registrar of the sum of \$113.50, tendered to him as the fees properly payable to and collectible by him for fees, to which the said Registrar and the Judge were entitled, as well as the fees payable to the Crown in that behalf; and why the said Registrar should not pay the costs of the application.

In the affidavit of Mr. Papps it was stated that the testator was senior partner in a mercantile business, carried on at the city of Hamilton by himself, together with William Forrest Findlay and Alexander Stephen, under the style of Thomas C. Kerr & Co.: that the said Kerr had the largest share or interest in said business: that, as solicitor for Catharine Elizabeth Kerr, he presented the usual application to the Surrogate Court, and prepared and filed the necessary proofs in support of such application, copies whereof were annexed to his affidavit: that the bulk of the testator's estate consisted of his interest in the aforesaid business, and in the affidavit stating the value of the estate, and in the inventory and valuation of the estate, the value of the testator's interest was stated to be \$60,000,

which he had reason to believe would be in excess of the amount likely to be realized : that the amount was arrived at by stock taking and a valuation of the assets of the business in the usual way, in which the several proportions of the different partners in the assets of a co-partnership business are ascertained ; that is to say, the gross amount of the stock in trade was ascertained and due allowance made on goods which might have depreciated in value, so as to bring the value of the stock in trade to a fair cash value : that the gross amount of the book debts was also ascertained and a proper allowance made to cover bad debts, and the real estate and all other assets of the said business were as nearly as possible estimated at their actual value, as available for the payment of the debts and liabilities of the firm : that from the gross value of the assets so ascertained were deducted the total liabilities of the said firm, and the surplus so ascertained was divided among the several partners according to their several interests, and the above amount was in excess of what would appear in the books to be the interest of the testator in the assets of the business, and of the amount which would come to the hands of the executrix to be administered, and which would in fact form the private estate of the testator, as the bulk of the stock had been sold at a larger discount than was contemplated when the value was estimated : that no objection was made to the sufficiency of the proofs, but the Judge of the Surrogate Court objected to the mode of ascertaining the value of the testator's estate, and insisted that the amount to be inserted in the inventory and valuation and affidavit of value of the estate, should be the apparent share of the gross assets, which would belong to the testator, irrespective of the debts and liabilities of the firm : that the amount of the gross assets, which would be the testator's interest in the business, was the sum of \$173,215, or thereabouts, as lately estimated for the purpose of applying for a mandamus : that the only point involved in the matter was that under the Surrogate Act, R. S. O. ch. 46, the Judge may demand for his own use the fees mentioned in schedule B to

the Act, which said fees amount to \$1 for every \$1,000 of the property devolving, and provides that such fees should be collected by the Registrar on or before each proceeding and paid over to the Judge; and in addition to the said fee of \$1 for every \$1,000, so payable to the said Judge, the sum of fifty cents was payable on each \$1,000 to the Crown, which latter fee differed from what it was before the revision of the statutes: that the Judge had made his fiat for the probate to issue, and the said Registrar demanded the sum of \$285 for the fees before he would issue probate, such fees being as follows: Registrar, \$17.50; the Crown, \$89.50, and the Judge, \$178, the fees to the Crown and Judge being based on the sum of \$176,000 devolving, which was made up by substituting in the inventory \$173,215, for the \$60,000 therein contained.

March 18, 1879, *McKelcan*, Q. C., shewed cause. The cash value of the entire interest of the testator in the partnership, undiminished by the deduction of the debts or obligations of the partnership, as claimed by the Judge of the Surrogate Court, must be taken as the property devolving upon the executrix, and on which the probate fees must be calculated. The rule is that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*: *Rex v. Collector and Comptroller of Customs at Liverpool*, 2 M. & S. 223; *Buckley v. Barber*, 6 Ex. 164; and that equitable assets are liable to probate fees as well as legal assets: *Carr v. Walker*, 2 B. & Ad. 905-8. He also cited *Attorney General v. Brunning*, 8 H. L. Cas. 243; *Executors of Perry v. The Queen*, L. R. 4 Ex. 27; *Partington v. Attorney General*, L. R. 4 H. L. 100; *The Attorney General v. Partington*, 3 H. & C. 193; *Forbes v. Steven*, L. R. 10 Eq. 178.

J. K. Kerr, Q. C., contra. A partnership is dissolved by death, and the surviving partners have the right to wind up the estate. The executor of the deceased partner does not take the property as a tenant in common with the surviving partner, but is interested only in any surplus that may remain after payment of the liabilities of the estate: *Collyer on Partnership*, 943-949; *Partridge v.*

McIntosh, 1 Grant 50; *Bilton v. Blakely*, 6 Grant 575; *Rathwell v. Rathwell*, 26 U. C. R. 179; *Horrell v. Witts*, L. R. 1 P. & D. 103.

March 25, 1879. CAMERON, J.—No objection was taken on the ground that the proceeding by mandamus was not the proper remedy, and I give no opinion on the point, as I think the rule must be discharged on the merits. The authorities cited establish that in a case like the present the doctrine of *jus accrescendi* cannot prevail, and that partners are tenants in common. If this be so, the property devolving upon the executrix as of the estate of the testator was the value of his interest in the estate, undiminished by deducting the liabilities of the firm. As between her and the surviving partners, the latter have a lien upon the assets to the extent of their liabilities, on account of the partnership; but this lien does not make the property less hers than it would have been if it remained in the testator's possession after he had created a lien thereon in favour of a creditor, and then devolved on her subject to the lien. It appears to me, in valuing a testator's property, its actual cash value must be taken, without reference to the incumbrances on it, as it is the entire property that is to be administered, the creditor not being bound to look to the security he holds for payment, but being entitled to enforce his claim against any other property of the testator that may come to the hands of the executrix to be administered.

In *Rathwell v. Rathwell*, 26 U. C. R. 179, it was held that the administratrix of an intestate could maintain trover against his surviving partner for a conversion of the partnership property, and without the administratrix having a right of property in the partnership assets, and not a mere right to an account and share in the surplus of the proceeds, after paying debts, trover would not lie.

In *Mayhew v. Herrick*, 7 C. B. 229, which in its result was the converse of *Rathwell v. Rathwell*, the same doctrine as to the right of property was upheld. There the defen-

dant, a sheriff, under an execution against A., seized the partnership goods of A. B. and sold them to several parties. The execution and seizure dissolved the partnership, but it was held that the sheriff was not liable, on the ground that one tenant in common cannot be sued by the other for a conversion, but is entitled to half the proceeds of the sale. There being no evidence to shew the actual share of B. it was presumed he and A. were equally interested, The executrix in this case would stand in the same place as the sheriff. If therefore she were to take into her own possession and sell the property, she would only have to account to the other partners for their share in the assets, or they, under the authority of *Buckley v. Barber*, 6 Ex. 164, might resort to the purchaser to recover their interest.

In *Bilton v. Blakely*, 6 Grant 575, Esten, V. C., said: "Supposing all the debts of the surviving partner to be paid, and that joint effects remain unsold, I do not see that the surviving partner has a right, or indeed the power, to dispose of them to the exclusion of the representatives of the deceased partner. It is clear that the survivor and the representatives of the deceased partner are tenants in common of the joint effects remaining unsold, and I do not see how the sale by the surviving partner could confer a title to more than an undivided moiety. Such a sale would be merely for the purpose of division; but it is a rule of equity, not of law, which prescribes a sale for this purpose, and the legal title to an undivided moiety would appear to remain in the representatives of the deceased partner notwithstanding the sale. I may add that any exclusion of the representatives of the deceased partner from their due share in the arrangement of the partnership affairs would entitle them to an injunction and receiver." This shows that the representative of the deceased partner is a tenant in common with the surviving partner, and is entitled to see that the partnership estate is properly administered and wound up; while by reason of the joint debts of the partnership the partners surviving have a right to have the joint assets applied in discharge of the joint liabilities; but

this, it seems to me, does not determine that the undivided share of the deceased partner in the corpus of the estate did not devolve upon his personal representatives.

In *Horrell v. Wilts*, L. R. 1 Pro. & Div. 103, all that was decided was that the Court would not appoint an administrator *pendente lite* to interfere with the management of the business by the surviving partner, without sufficient ground being shewn in the interest of the estate for such interference. The language of the judgment of Sir J. P. Wilde, which it is assumed militates against the view that the executrix in this case would have any right to interfere, is as follows: "The deceased and the plaintiff were joint tenants of this property; it belonged to them in partnership, and if an administrator were to be appointed, there would be nothing for him to lay his hands upon until an account of the estate has been taken in Chancery." All that this in effect means is, the surviving partners have a lien upon the joint assets till the joint liabilities are discharged; and it by no means determines that an interest equal to the deceased partner's share in the corpus of the estate had not devolved upon the executrix.

There is now, according to the evidence, an estate in which the deceased had a share in the corpus equal to \$173,215, and if he had held that estate without being in partnership, it would have been liable to probate fees in the full amount, though the deceased's liabilities amounted to \$170,000, or to the full amount of the assets. Then, assume that each of the surviving partners had an interest in the estate of \$5,000 only, that they both died before probate was granted to the representatives of any of the partners, and so the whole corpus of the estate had to be administered, would the representative of the last deceased partner have to pay the probate fees on \$173,215, and the first deceased partner on \$60,000, and the second on \$5,000, in which event property only worth \$183,215, would be paying probate fees on \$243,215? But would not the representative of the last deceased partner say, the interest devolving on me is only

\$5000, because I have to account to the representatives of my testator's deceased partners for their share, my testator being in effect a trustee for them? And unless the doctrine of *jus accrescendi* prevailed, this would be a just and legal contention, and the effect would be that property worth \$183,215, would pay probate fees on \$70,000, and so \$113,215 of property that would pay fees if it had belonged to one individual, would be exempt by reason of its having belonged to three. It does not appear to me that a construction that would work such a result, should prevail, unless by some clear rule of law it cannot be avoided, and I do not think the rights of the surviving partners as to the management of the partnership estate, for the purpose of discharging joint obligations, do render such a construction necessary. I think therefore that for the purpose of taking out probate and paying fees thereon, the representatives of a deceased partner must be taken to be interested in the corpus of the partnership effects to the extent of the deceased's share, undiminished by the deduction of the debts and liabilities of the firm, and therefore there devolved upon the present applicant assets of the value of \$176,215, and the contention of the learned Judge of the Surrogate Court was correct. The case appears to have been conducted in a friendly spirit, the learned Judge being desirous of having his rights considered and determined as a guide in future cases. The rule will, therefore, be discharged without costs.

Rule discharged, without costs.

REGINA V. HISCOX.

Livery stable keeper—License—Conviction quashed.

Since the 31 Vic. ch. 30, sec. 33, O., as amended by 32 Vic. ch. 43, sec. 22, transferring the power of regulating and licensing livery stables, &c., in cities, to the board of commissioners of police, and the 36 Vic. ch. 48, sec. 335 (now R. S. O. ch. 174, sec 415), making it their duty to exercise their power, and repealing all acts inconsistent therewith, by-laws previously passed by corporations for the purpose have been rendered inoperative, and a conviction under such a by-law was therefore quashed.

November 8, 1878, *F. Osler* obtained a rule *nisi* to quash the conviction in this case upon the following grounds:—

1. That the conviction was defective and bad on the face thereof.
2. There was no evidence to support it.
3. The magistrate acted without jurisdiction in making it.
4. The by-laws of the city of London, under which the magistrate professed to make the conviction, were, and each of them was, invalid and illegal.
5. The corporation of the city of London had no power to pass the by-law or sections thereof under which the conviction was made, the power to make rules and regulations in respect of the matters dealt with by the said sections being vested by law in the police commissioners of the city.
6. That, even if the corporation had power to require a license to be taken out, they had no power to require a fee for taking it out, and the defendant having been willing, and having offered to take out the license without payment of a fee illegally demanded, the conviction was void on that ground, and also because the by-laws were bad for imposing a fee in respect of the license.
7. The fee imposed in respect of the license was excessive, and no more than a nominal fee, if any, could be imposed, and the by-laws and conviction were, for that reason, also void.

The facts were that the defendant had been convicted by the police magistrate of the city of London on the fourteenth day of October, 1878, for that he at the city of London, on the 26th day of September, 1878, unlawfully did exercise the calling of a livery stable keeper, without

having taken out the license therefor by law required, contrary to the 123rd and 221st sections of the by-law for the enactment of rules and regulations for the general government of the city of London, passed the 9th day of July, 1866.

This conviction was brought into this Court by *certiorari*, when the further facts stated in the judgment appeared.

December 20, 1878, *Ferguson*, Q. C., shewed cause.

Osler, contra. The city by-law is effete and superseded by subsequent legislative powers, and does not continue in force merely because the commissioners of police have passed no by-law. The conviction is for a breach of the city by-law. Neither the council nor the commissioners can impose a fee for the license. The Act never gave them power to do so, though it authorized the imposition of a fee for other licenses. Moreover, it does not appear that the commissioners of police have any funds to dispose of, or to whom the license fee should belong.

The statutes cited are referred to in the judgment.

March 28th, 1879. ARMOUR, J.—The by-law under which the conviction in question took place was passed by the Council of the Corporation of the City of London on the ninth day of July, A.D. 1866, and the particular sections of it bearing upon this controversy are:

The 123rd. "Livery Stables."—"That the owner or owners of every livery stable kept within the City of London, before it shall be lawful for him, her or them, to exercise such calling, shall take out a license for such purpose."

The 166th. "Licenses."—"The City Clerk shall issue all licenses and pay over to the City Chamberlain, for the use of the City, all fees and moneys received in respect thereof."

The 167th. "Fees."

For every license not otherwise provided for	\$1 00
For every bond	50
For every certificate	25

The 220th. "Licenses."

"All licenses shall be in force from the issuing thereof until the last day of February in each year."

The 221st. "That the following sums shall be payable for licenses respectively, that is to say, to keep a livery stable, \$30."

This by-law was passed under the authority of Consol. Stats. U. C., ch. 54, "An Act respecting the Municipal Institutions of Upper Canada," sec. 294, of which provides that, "The council of every city, town, and incorporated village, may respectively pass by-laws for the following purposes," among which purposes are those set forth in sub-sec. 31, "For regulating and licensing the owners of livery stables, and of horses, cabs, carriages, omnibuses, and other vehicles used for hire; for establishing the rates of fees to be taken by the owners or drivers; and for enforcing payment thereof."

This by-law has never been repealed by the city council, nor would the repeal merely of the Act Consol. Stat. U. C. ch. 54, by the Act 29 & 30 Vic. ch. 51, D.; nor the repeal merely of the last mentioned Act by the Act 36 Vic. ch. 48, O.; nor the repeal merely of this latter Act by R. S. O., ch. 174, have affected this by-law in any way, if the power to pass such a by-law as that in question had still remained in the city council, for each of these Acts contains a provision preserving existing by-laws. [See 29 & 30 Vic. ch. 51, sec. 3; 36 Vic. ch. 48, sec. 3; R. S. O., ch. 174, sec. 4.]

But the difficulty in the case in hand is to say that this by-law is now in force, owing to the legislation transferring the power of regulating and licensing the owners of livery stables to the Board of Commissioners of Police.

Sub-sec. 31 of sec. 296, of 29 & 30 Vic. ch. 51, is a re-enactment in its very words of sub-sec. 31 of sec. 294, of Consol. Stat. U. C., ch. 54, and by sec. 33 of the Act 31 Vic. ch. 30, "An Act to amend the Municipal Institutions Act of Upper Canada, 29 & 30 Vic. ch. 51 & 52," it is provided that "The Board of Commissioners of Police in cities shall have the powers vested in city councils by sub-section 31 of section 296, instead of said city councils"; and this section is amended by section 22 of 32 Vic. ch. 43, by adding thereto the words following, "and for that purpose

the said Board of Commissioners of Police may pass by-laws and enforce the same in the manner and to the extent formerly conferred upon the city council, under the authority of the Municipal Act of 1866."

The provision so made and amended appears in 36 Vic. ch. 48, sec. 335, and in R. S. O. ch. 174, sec. 415, in a somewhat altered form, as follows:—

"The Board of Commissioners of Police shall in cities regulate and license the owners of livery stables, and of horses, cabs, carriages, omnibuses, and other vehicles used for hire, and shall establish the rates of fare to be taken by the owners or drivers, and may provide for enforcing payment of such rates, and for such purposes shall pass by-laws and enforce the same in the manner and to the extent in which any by-law to be passed under the authority of this Act may be enforced."

And by 36 Vic. ch. 48, sec. 515, the Acts and parts of Acts inconsistent with that Act are repealed.

I think that the effect of this legislation, in first taking away from the city council the power of passing by-laws for regulating and licensing the owners of livery stables, and vesting this power in the board of commissioners of police, and in then making it imperative upon the board of commissioners of police to regulate and license the owners of livery stables, and in repealing the legislation inconsistent with the duty so imposed upon them, has been to render the by-law in question, in so far as its provisions are in controversy here, of no further force or effect.

I think, therefore, the conviction must be quashed.

Rule absolute.

IN RE ALEXANDER CAMPBELL, JOHN MUDIE, LUCRETIA
H. PRENTISS AND GEORGE PECK.*Award—Finality—Certainty.*

By a submission, after reciting that differences existed between the parties as to the disposition to be made by P. of certain funds collected by him from the tenants of certain lands, and that they had agreed to refer the same to S., the parties covenanted to abide by his award "of and concerning the premises aforesaid, or anything in any manner relating thereto." It appeared that one D. had conveyed to P., with full covenants, three undivided fifths of a certain lot, of which it afterwards turned out that he owned only one-fifth, and that P. had collected rents from the tenants of D. on other lands for the purpose, as he alleged, of repaying himself what he had paid D. for the two-fifths.

The arbitrator found that the funds in P.'s hands were collected by him for that purpose, and awarded that he should retain for himself five per cent. on the sums collected, and should out of the balance repay himself two-thirds of the purchase money paid by him.

Held, that the award embraced all matters submitted: that there was no necessity and no power to direct a reconveyance of the two-fifths, and that it was sufficiently certain without specifying the amount to be repaid.

14th February, 1879, *James Maclellan*, Q.C., obtained a rule *nisi* to set aside or refer back an award made between the parties by Herbert Stone McDonald, Esq., Judge of the County Court of Leeds and Grenville on the 18th January last, under a submission by deed, dated 1st of August, 1878, on the grounds, that the award did not dispose of all matters referred to the arbitrators by the submission: that it did not decide whether George Peck should re-convey the lands in the submission mentioned, or any share or part thereof; and that the arbitrator by mistake allowed George Peck to retain two-thirds of the purchase money paid by him without ascertaining the amount thereof.

The submission recited that whereas certain disputes and differences had arisen and were then pending between the parties in reference to the disposition to be made by the said George Peck of certain funds in his hands collected by him from the tenants of certain lands in Lansdowne, known as the Hay lands, and held under lease from Douglas Prentiss and Guy R. Prentiss, deceased, the said funds being claimed by the said Alexander Campbell, John Mudie, and

Lucretia H. Prentiss as due them as part of the estate of the said Douglas Prentiss and Guy R. Prentiss, deceased; and in order to put an end thereto and to obtain an amicable adjustment thereof, the said parties had agreed to refer the same to the award of Herbert Stone McDonald, as sole arbitrator between them in this matter, whose award should be binding and conclusive in relation to the said matters in dispute; and then proceeded, "the parties do and each of them doth covenant, promise, and agree to and with each other, well and truly to stand to and obey, abide by, observe, perform, fulfill and keep the award of the said arbitrator of and concerning the premises aforesaid, *or anything in any manner relating thereto.*"

It appeared that on the 2nd of April, 1858, Douglas Prentiss conveyed in fee simple by deed, containing unqualified or full covenants for title, to George Peck three undivided fifth parts of the west half of lot number eight in the first concession of Lansdowne, together with a small broken front as far south as Landons Bay, containing one hundred and fifty acres, for the expressed and admitted consideration of £537 10s. or \$2,150: that subsequently it appeared Prentiss had only a title to one undivided fifth, and that an ejectment had been brought by Sir Charles James Stuart to recover an undivided share which he claimed in the land, and on the trial of this suit, the decision of which is reported 20 U. C. R. 514, it was determined that Prentiss's title in effect only extended to one undivided fifth: that Peck had under the authority of Prentiss collected rents from the tenants of Prentiss on other lands for the purpose, as Peck alleged, of repaying him for the amount he had paid in respect of the two undivided fifths as to which Prentiss's title had proved defective.

The arbitrator in his award, after reciting the submission, awarded as follows: "That under and by virtue of a verbal agreement entered into by and between Guy R. Prentiss and Peck the funds in the hands of the said Peck were collected by him from the tenants for the purpose of being used and applied by him

towards and for the repayment to him, the said Peck, of certain moneys which he had paid Douglas Prentiss, in his lifetime, as and for part of the purchase money of two undivided fifth parts of the above described land, which the said Douglas Prentiss had sold and conveyed in fee to the said Peck; and that the disposition to be made by the said Peck of the said funds was to be as follows: he was, in the first place, unless he had already done so, to pay himself a commission of five per cent. on all sums collected by him as rents either for the said Guy Prentiss or the parties to the submission of the first part; and, in the second place, to apply the balance of the funds so collected by him, or so much thereof as might be required for that purpose, to repay him two-thirds of that portion of the said sum of £537 10s. actually paid by him to the said Douglas Prentiss, and if the amount of funds should prove larger than was required for the purpose, he was to pay the balance to the parties of the first part.

March 18th, 1879, *Delamere* shewed cause. The submission only authorized the arbitrator to determine what was to be done with the moneys collected by Peck, and he had nothing to do with the land or ascertaining the amount collected, or the amount that Peck had paid on account of the purchase money of the land. In deciding that Peck was to retain two-thirds of the portion paid by him, the award is sufficiently certain. He referred to *Russell* on Awards, ed. 1878, 263, 287; *Cargey v. Aitcheson*, 2 B. & C. 170; *Plummer v. Lee*, 2 M. & W. 495; *Wohlenberg v. Lageman*, 6 Taunt. 250.

James MacLennan, Q. C., contra. It would be unjust for Peck to retain the two undivided fifths of the land and get back the money paid therefor also. The re-conveyance of the land was incident to and included in the submission, and the arbitrator not having awarded thereon, the award is void. Providing that two-thirds of an amount should be paid, without defining that amount, was clearly uncertain, and the award should on this ground also be

set aside. He cited *Russell* on Awards, ed. of 1870, 650-652, 246-249.

March 25th, 1879. CAMERON, J.—I think the arbitrator awarded on all that was submitted to him. The reference did not in any manner give him power to direct a re-conveyance of the land. The re-conveyance of the two undivided fifths would be valueless if the title of Douglas Prentiss thereto was, as it undoubtedly was, bad; and it certainly cannot be inferred that the right to a re-conveyance of that which was useless was a matter that was in dispute and embraced in the submission under the words, “disputes and differences in reference to the disposition to be made by the said George Peck of certain funds in his hands, collected by him from the tenants of certain lands,” or in the words, “or anything in any manner relating thereto;” and still less could it be assumed that Peck, who may by actual possession have acquired a title to the land, not only as against the person who conveyed to him, but as against the whole world, intended by the reference to authorize the arbitrator to award that he should make a conveyance to any one of any portion of the title so acquired. It is more than probable, from the correspondence put in evidence, that the Prentisses have by written acknowledgment precluded themselves, and those claiming under them, from yet setting up the Statute of Limitations against Sir Charles James Stuart, or those claiming under him; and on the merits, as between them and Peck, there is no reason why they should be in a different position than they would have been had this arbitration taken place just after the Stuart title was established. Had Peck then sued on his covenant for good title or quiet enjoyment, he would have been entitled to recover the full value of the encumbrance, without re-conveying, and it cannot now be reasonably sustained that either equitably or legally he should re-convey two undivided fifths on being allowed to repay himself out of moneys collected for the purpose two-thirds of the purchase-money paid by him. On the point of uncer-

tainty, I think the case is within the authorities cited by Mr. Delamere. And so the rule must be discharged. with costs.

Rule discharged, with costs.

CANTY V. CLARK.

Work and labour—Certificate of engineer.

Declaration on the common counts for work done. Fourth plea, except as to part, that plaintiff's claim was for work done by plaintiff for defendant, under a covenant by plaintiff to construct and complete the grading, &c., of part of a certain railway to, &c., according to a profile thereof by the chief engineer, at certain specified prices, &c.; and that the said grading, &c., should be measured, calculated, and determined by the said engineer, whose decision should be conclusive; and that the said engineer, before this action, measured and determined said work and amount payable therefor, which the defendant paid to plaintiff.

Held, on demurrer, plea good, as shewing not a covenant to refer to arbitration, but to pay certain prices to be ascertained by the engineer, whose ascertainment was a condition precedent to plaintiff's right to recover.

Fifth plea. As to the claim for work done: that before any of the work was done, or the materials provided, plaintiff covenanted to perform the same to the satisfaction of said engineer, and that defendant should retain ten per cent. of the value of said work, which is the plaintiff's claim herein pleaded to, and that same should not be payable until said engineer was satisfied with said work, and said engineer was not, before action, satisfied therewith: *Held*, on demurrer, plea good; for that it was not a collateral covenant that was set up, but that the engineer was to be satisfied was a condition precedent to plaintiff's right to recover.

To the fourth plea plaintiff replied: 1. That the deed was not executed by defendant, nor was there any such mutual agreement between him and defendant as bound defendant to abide by the decision of the engineer: 2. That before the decision of the engineer plaintiff withdrew all authority to determine as against him, or in any way affecting him in the matter of the said measurement. *Held*, on demurrer, bad; for as to the 1st, it was not essential that defendants should execute the deed containing the contract; and as to the 2nd, the covenant was treated by it as a mere reference to arbitration, which it was not, but a

term of the contract requiring observance before a cause of action arose, and the authority to the engineer was not revocable; but, *Seemle*, that, even treating the covenant as a reference to arbitration, there being no provision in the submission itself for making the submission a rule of Court, it was irrevocable.

To the fifth plea plaintiff replied that the engineer was satisfied with the work, save that the road or ground set apart for the railway had not been in some places cleared to its full width, and for and in respect of which a deduction of a small sum, much less than the said ten per cent., was made in the final estimate of the engineer, assented to by plaintiff, and formed no part of the moneys sued for. *Held*, on demurrer, bad, as not shewing any authority or power in the engineer to make any deduction from plaintiff's claim in respect of work not to his satisfaction, and admitting that portion was not to his satisfaction; and as not averring a substantial performance of the work to the satisfaction of the engineer.

DECLARATION on the common counts, for work done and material provided by the plaintiff for the defendant, and on account stated.

Fourth plea, except as to \$39.97, that the claim of the plaintiff was for work done and materials provided by plaintiff for defendant under and by virtue of a covenant contained in a certain deed of the plaintiff, whereby he covenanted with the defendants to construct, and in every respect complete the grading, clearing and grubbing, from the commencement of the line of the Stratford and Huron Railway, in the town of Stratford, to the end of section three of the line according to the profile thereof prepared by the chief engineer, at the prices, and for the remuneration following: For grading, nineteen and three quarter cents per cubic yard, and cleaning and grubbing, twenty-nine dollars and fifty cents per acre; and that the said quantities and amounts of grading, clearing, and grubbing, should be measured, calculated, and determined by the chief engineer of the Stratford and Huron Railway Company, whose decision in respect thereof should be conclusive. And the defendant further say that the said work done, and material provided, in the declaration alleged, are the said identical grading, clearing, and grubbing, and no other work or material, and that the chief engineer of the said railway company, before the commencement of this action, measured, calculated, and determined the quantity of said grading at eighty-one

thousand four hundred and fifty-two cubic yards, and the amount therefor at the rate per cubic yard, aforesaid, at sixteen thousand and eighty-six dollars and seventy-seven cents, and the quantity of clearing and grubbing at forty-six acres and three-tenths of an acre, and the amount thereof, at the rate per acre, as aforesaid, at one thousand three hundred and sixty-five dollars and eighty-five cents, making in all the sum of seventeen thousand four hundred and fifty-two dollars and sixty-two cents, which amount the defendants, before the commencement of this suit, paid to the plaintiff, and the plaintiff received from the defendant.

Fifth plea. As to so much of the declaration as alleges a claim in respect of work done and materials therefor provided, that before any of the said work was done, or materials therefor provided, the plaintiff, by his deed, covenanted with the defendant to perform the said work and provide the said materials for the defendants to the satisfaction of the chief engineer of the Stratford and Huron Railway Company, and that the defendant should retain ten per cent. of the value or amount of the said work and materials, which was the claim of the plaintiff in respect of the matters pleaded to, and that the same should not be payable by the defendant until after the said chief engineer should have been satisfied with the said work and materials, and the said chief engineer was not, before the commencement of this suit, satisfied therewith.

Replication to fourth plea. 2. That said deed was never executed by the defendant, nor was any such mutual agreement made between plaintiff and the defendant, in respect of said work and labour, as bound defendant to abide by the said decision of the said chief engineer in respect of the matters in the said plea.

3. That before the final determination and decision of the chief engineer in respect of the matters in said plea alleged, the plaintiff withdrew from him all authority or power to determine as against him, or in any way affecting him, in the matter of the said measurement.

Replication to fifth plea. That the said chief engineer

was satisfied with said work, save that the road or ground set apart for the said railway had not been in some places cleared to its full width, and for and in respect of which a deduction of a small sum, much less than the said ten per cent., was made in the final estimate of the said chief engineer, assented to by the plaintiff, and formed no part of the said moneys sued for.

Demurrer to fourth plea. That said plea does not avoid the plaintiff's cause of action: that to give effect to the deed would be to compel plaintiff to submit to the arbitration of a private person against his will and forego his right to claim in the proper and ordinary Court: that it was not shewn that the determination of the chief engineer was a condition precedent to payment for the work: that the assent of plaintiff to the chief engineer's proceeding to determine the quantities of work after the work was done was not shewn.

Demurrer to the second replication. That it admits that the plaintiff covenanted as stated, and that the award was made and performed by defendant, as mentioned, thus admitting a mutual agreement. 2. That the non-execution by defendant of the deed is no answer to the plea. 3. The agreement to refer being not of causes of action accrued, but merely to ascertain the amount earned by the plaintiff under his covenant, the plaintiff is not bound by it unless defendant refused to sanction the reference, which is not alleged.

Demurrer to the third replication. 1. That the replication is a departure. 2. That it does not allege that the deed provided against the submission being made a rule of Court and that the revocation was by leave of the Court. 3. That it does not aver that defendant was notified of the revocation, while it admits that the award was made and was performed by defendant, and plaintiff's received payment of the amount awarded. 4. As the plaintiff covenanted that the amount he was to receive for his work had to be ascertained by the chief engineer, the replication negatives any present cause of action.

To the replication to the fifth plea the following grounds

were stated : 1. That the replication is a departure from the declaration. 2. That the replication admits that the whole work contemplated was not done, and does not aver the chief engineer had power to accept or be satisfied with less than the whole work.

Exception to the fifth plea—that it sets up a collateral covenant for breach of which the plaintiff might be liable, but does not set forth that such covenant, or the observance thereof, was a condition precedent to the right of the plaintiff to recover for the work he had done.

February 25th, 1878. *F. Osler*, for the plaintiff.

Robert Smith, contra.

The cases cited are referred to in the judgment.

March 4th, 1879. CAMERON, J.—I think the fourth plea good, that it shews not a covenant to refer disputes, but one to pay certain prices for work per cubic yard and per acre, according to the nature of the work, the quantities whereof should be determined by the chief engineer of the Stratford and Huron Railway Company, and such ascertainment was a condition precedent to the plaintiff's right to recover. The case of *Pegg v. Nasmith*, 28 C. P. 330, cited by Mr. Osler, does not support the plaintiff's contention here. In *Scott v. Avery*, 5 H. L. Cas. 811, cited in *Pegg v. Nasmith*, the Lord Chancellor said : "There can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration. If I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants, shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. But if I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen."

Here the covenant is in effect that the chief engineer shall determine the quantities for which defendants are to pay the agreed price. *Ferguson v. The Corporation of Galt*, 23 C. P. 66, is to the same effect. The covenant is not in fact a reference to arbitration, but rather the appointment of a valuator or assessor, without whose ascertainment of quantities no cause of action can arise.

Both replications are bad. The work was done by plaintiff on a contract entered into and signed by him, and it was not essential that the defendants should sign or execute the deed containing the contract. It might as well be urged that the plaintiff, if he had stipulated in the deed to be paid for the work six months after completion, was not bound to wait for six months, as the defendants had not signed the deed, and so there was no mutuality, as to say under his covenant he was not bound to have the quantities ascertained in the manner provided by the covenant itself.

The ascertainment of the quantities by the engineer fixes the time of payment under the deed, and this no more requires the concurrence of the defendants therein, than would the six months' limitation to be evidenced by their execution of the deed. The second replication to the fourth plea is therefore not sustainable in law, as it sets up as an answer to that plea only the fact of the non-execution by defendants of the deed and the alleged want of mutuality of agreement arising from that non-execution. *McInnes v. The Western Ins. Co.*, 30 U. C. R. 580, shews the non-executing party acting on the contract and accepting a benefit under it, is bound by it; *a fortiori*, the executing party should be bound.

The third replication to the fourth plea simply sets up a revocation of the authority of the chief engineer, treating the covenant as a mere reference to arbitration. For the reasons already given I think it is not a reference, but a term of the contract requiring observance before a cause of action arose, and the authority to the chief engineer was not revocable: *Collins v. Collins*, 26 Beav. 306; *Bos v. Helsham*,

L. R. 2 Ex. 72; *Mills v. Barley*, 2 H. & C. 36; and this renders it unnecessary to determine whether treating it as a reference to arbitration, with no provision in the submission itself against making the submission a rule of Court, it is not irrevocable under sec. 204, ch. 50, R. S. O.; and *Wood v. Closter*, 16 U. C. R. 490, would seem to be an authority against the right of revocation.

The fifth plea is not open to the exception taken thereto. It sets up that the work was done under a covenant entered into by plaintiff, that the work should be done to the satisfaction of the said chief engineer: that ten per cent. of the value of the work should be retained by defendants, which is the claim of the plaintiff herein pleaded to, and that the ten per cent. should not be payable till the said chief engineer should be satisfied with the work and materials, and that he was not satisfied before the commencement of the suit. This is not a collateral covenant, and the satisfaction of the engineer is a condition precedent to the plaintiff's right to recover, upon the authorities already cited.

The special replication to this plea is not sustainable, as it does not show any authority or power in the chief engineer to make any deductions from the plaintiff's claim in respect of work not to his satisfaction, and it admits a portion of the work was not to his satisfaction; at least, that is the effect of the allegation. "The chief engineer was satisfied with said work, *save that the road or ground set apart for the said railway had not been, in some places, cleared to its full width.*" That is nothing more than saying he was satisfied with all except what he was not satisfied with, and I do not think it can be said that the replication avers a substantial performance of the work to the satisfaction of the engineer. If that is what is meant, then the plaintiff should have simply replied taking issue.

On the whole, judgment should be entered for the defendants on all the demurrers, and on the exceptions to the fifth plea, and they are entitled to costs.

Judgment accordingly.

GRANT V. RELIANCE MUTUAL FIRE INSURANCE CO.

Insurance—Interim receipt—Conditions—Termination of risk.

An interim fire insurance receipt stated that the plaintiff had paid a certain sum for a three months insurance, subject to the approval of the directors, and declared that the property should be held insured for thirty days from date "unless notified to the contrary," but that the insurance thereby made was subject to all the conditions, &c., contained in and endorsed on the printed forms of policy then in use by the company. Among these was the 18th statutory condition, providing that the insurance might be terminated by the company, by giving ten days' notice to that effect, and by repaying a ratable portion of the premium for the unexpired term, and that the policy should cease after the expiration of ten days from the receipt of such notice and re-payment..

Held, that defendants were bound to give the ten days' notice and return a ratable portion of the unearned premium before they could terminate the insurance under the receipt within the thirty days.

DECLARATION on an interim insurance receipt granted to the plaintiff by the local agents of defendants, at the village of Brussels, on plaintiff's application for insurance upon certain property belonging to plaintiff, in the said village, averring loss within the thirty days for which the insurance was effected: that defendants did not before or since the loss deliver to plaintiff a policy, though the plaintiff was entitled to one; nor did they notify plaintiff what defendants' determination was, nor return the plaintiff the premium paid by him, or any part thereof.

The receipt, which was set out in the declaration, was as follows:—

"Provisional Receipt.

Agent's Office, Grey,

"Agent's No.

May 25th, 1878.

"The Reliance Mutual Fire Ins. Co.

"HEAD OFFICE, Toronto.

"Received from John R. Grant, of Brussels, eight dollars ninety-one cents, being the premium for an insurance to the amount of nine hundred dollars for the term of three months on the property described in his application of this date, subject, however, to the approval of the Board of Directors. And it is hereby declared that the property so described shall be held insured for thirty days from this

date, unless notified to the contrary; but the insurance hereby made is subject to all the conditions, rules, and regulations contained in and endorsed upon the printed form of policy in use by the company at the date hereof.

"Received in cash on the above mentioned undertaking, \$8.91.

"A. HUNTER, *Agent*.

"N.B.—Should applicant not receive a policy within twenty-five days from this date, please communicate with head office."

Among other conditions, &c., endorsed upon the printed form of policy in use by the defendants, was the following, being the 18th statutory condition:—

"The insurance may be terminated by the company at any time, by giving ten days' notice to that effect, and by repaying a ratable portion of the premium for the unexpired term, and the policy shall cease after the expiration of ten days from the receipt of such notice and repayment."

Third plea.—That before the expiry of thirty days from the date of the receipt in the declaration mentioned, and before the loss by fire in the said declaration mentioned, the defendants notified the plaintiff that the property therein described would not be held insured by the defendants.

Replication.—That the said alleged notice was not given ten days before the happening of the said loss by fire, and that the defendants did not at any time before the said loss by fire repay to the plaintiff a ratable portion of the said premium for the unexpired term of insurance, as required by the said condition in that behalf in the said count set forth.

Demurrer.—That in order to terminate the insurance under the interim receipt any notice is sufficient, and that the condition in regard to ten days' notice and repayment of a ratable portion of the premium is not applicable to the conditional insurance effected under the interim receipt, and even if applicable the receipt itself provides an additional mode of termination within thirty days, that is to say, by notice of the refusal of the risk.

April 4, 1879. *Davidson Black*, for the demurrer. The insurance effected by the interim receipt is merely a conditional insurance. The agent is only authorized to grant such insurances, subject to the approval of the board of directors. As soon, therefore, as the company are notified and express their dissent, this conditional insurance is put an end to. The plaintiff says that by the terms of the interim receipt the receipt is to be subject to the terms and conditions of the policy, and he relies upon the 18th statutory condition endorsed on the defendants' policies entitling the insured to ten days' notice of the company's intention to refuse the risk before their liability can be determined. The conditions however only apply to a completed insurance, *i. e.*, when a policy has been issued, but not to the conditional insurance effected by the interim receipt. Even if this condition does apply to an interim receipt, it is for the protection of the insured, and therefore cannot be read as lessening the protection already afforded him by, and as altering the contract contained in, the interim receipt: *Goodfellow v. Times and Beacon Ins. Co.*, 17 U. C. R. 411; *Patterson v. Royal Ins. Co.*, 14 Grant 169; *Kelly v. Isolated Risk Ins. Co.*, 26 C. P. 299.

J. B. Clarke, contra. The case of *McQueen v. Phoenix Ins. Co.*, 29 C. P. 511, expressly decides that where, as here, the interim receipt is made subject to the terms and conditions of the defendants' policy, the insurance is only to be deemed to be effected subject to such conditions. The insurance effected by the interim receipt is therefore subject to the 18th statutory condition, so as to entitle the insured to the ten days' notice before the insurance can be determined. To decide otherwise would be the greatest injustice to the insured, for relying on the insurance as being effected subject to this condition, he does not take steps to effect an insurance in any other company, and therefore, if the defendants' contention is to prevail, they may, without any notice, at any time put an end to the insurance, and before the plaintiff is in a position to effect another the property may be destroyed. The very effect

of this condition was to prevent such an injustice being done. The question is one of construction, and the authorities shew it must be taken most strongly against the insurers: *Bliss on Life Insurance*, 656.

April 8, 1879. HAGARTY, C. J.—The interim receipt declares that the plaintiff has paid a named sum for a three months' insurance, subject to the approval of the directors. It declares that the property shall be held insured for thirty days from date, unless notified to the contrary. "*But the insurance hereby made is subject to all the conditions rules and regulations contained in and endorsed on the printed forms of policy in use by the company at the date hereof.*"

On the printed form of policy in use was this provision (No. 18 statutory condition):—

"This insurance may be terminated by the company at any time by giving ten days' notice to that effect, *and* by repaying a ratable portion of the premium for the unexpired term, and the policy shall cease after the expiration of ten days from the receipt of such notice and repayment."

The defendants urge that this 18th condition does not affect the interim receipt, and that as soon as the plaintiff is notified that the risk is declined the insurance ceases at once, and if the plaintiff be burned out the night following he is without remedy.

If the plaintiff, on taking the interim receipt, had seen the reference to the conditions of the policy and examined the form in use, I think he would have naturally concluded that he would be entitled to ten days' notice, and the return of the unearned premium.

Here he paid in full for a three months' insurance. If defendants' contention be right, he can be at any moment deprived of all protection, and if he has any remedy for the unearned premium it would be by proceeding against the company therefor, and, to say nothing of the possible delay of days in procuring another insurance, he would have to provide funds therefor.

Defendants argue that the plaintiff seeks to add another term to that expressed, viz., "you are insured for thirty days, unless notified to the contrary, which notice must be at least ten days before the risk shall cease."

Plaintiff urges, "I know I am only insured without a policy for thirty days, but you must not terminate the risk within that time without ten days' notice to me, and repayment of unearned premium."

Now the practical purpose of an interim insurance would seem to be the effecting of an immediate protection to property, grain delivered into store, a consignment of goods just received, &c., &c. The local agent is entrusted with the giving of a temporary protection, and justice and common sense would seem to require that each party should have a reasonable time to decide to continue or abandon the risk; the insurer to decline on further consideration, the assured in such an event to have a reasonable time to effect insurance elsewhere. The statutory clause 18 was introduced by the Legislature for obviously just cause. I can see no reason for its not being equally required in the case of an insurance on an interim receipt for thirty days, as on a policy for three months. No doubt but that the words in the latter part of the clause, "the policy shall cease," point to the existence of such a formal contract; but the earlier words are clear; and when we find the interim receipt specially referring to them and declaring that the usual policy conditions were to be considered as affecting the temporary insurance, I think I must hold the defendants bound by their own words. The property is held insured for thirty days, "unless notified to the contrary." "*But the insurance hereby made* is subject to all the conditions, rules, &c., contained in the printed policy," &c., &c. Could they speak more plainly to the applicant? "You are insured till notified; *but* (the word is significant so used) this bargain is subject to the printed conditions." He looks thereat and sees the ten days' provision, and that for the return of premium, and he naturally thinks he is safe. The words in the receipt, "the insurance hereby

made," are surely of equal force with the insurance evidenced by the policy in the 18th section. The well-known and oft-quoted rule is that ambiguity in such a contract is to be taken most strongly against the insurers. Stated most strongly in their favour, it is still so worded as, in my judgment, to mislead any intelligent applicant for protection.

At the foot of the receipt is "N. B.—Should applicant not receive a policy within 25 days from this date, please communicate with head office."

In defendants' view such a communication could be answered by a letter declining the risk, and the property might be burned that very night. Why is the insured to ask for a policy if not received within five days of the interim term, if the bargain is that the risk can be terminated at any moment? In this view he should do nothing, but patiently await either the policy or the notice of declining.

In the late case of *McQueen v. Phoenix Mutual Ins. Co.*, 29 C. P. 511, the Court points out that the company have the clear right to make the receipt, subject to the conditions in the usual policy (see p. 520), for their protection. I can see no valid ground for denying protection to the plaintiff, when he is referred to those very conditions in the most express terms.

See also the remarks in *Parsons v. Queen Ins. Co.*, 29 C. P. 207.

I do not dissent from the earlier decisions cited, such as *Goodfellow v. Times and Beacon Ins. Co.*, 17 U. C. R. 411; *Kelly v. Isolated Risk Ins. Co.*, 26 C. P. 299. I decide this case on its own facts as appearing on the demurrer. With the views I entertain of the law, I feel that I cannot give effect to such a defence as that before me.

Judgment for plaintiff on demurrer.

IN RE LLOYD AND CORPORATION OF THE TOWNSHIP OF
ELDERSLIE.*By-law—Omission in—Refusal to quash.*

The Court, in the exercise of its discretion, refused to set aside a by-law to grant \$35,000 to a railway company, good on its face, and which it considered to have been passed in good faith, merely because of the unintentional omission therefrom of the statement of an existing debt of about \$2,700, the assessed value of the property in the municipality being about \$1,500,000.

21st February, 1879. *H. J. Scott* obtained a rule *nisi* to quash by-law No. 8 of the Corporation of the Township of Elderslie, which was formally passed on the 25th of November, 1878, after having been approved by the ratepayers on the 9th of November previously, for granting \$35,000 to the Stratford and Huron Railway Company. The rule was moved on several grounds, but only one was relied on or pressed in the argument, viz., that the by-law stated that the then existing debt of the township was for principal nothing, and for interest nothing, whereas at the time the municipality was indebted for debentures issued under by-law No. 183 in 1876, by-law No. 185 in 1876, and by-law No. 15 in 1877.

An affidavit by the Reeve of the township was filed to the effect that on being served with the rule to shew cause he called a meeting of the council, and by resolution he was instructed not to oppose or shew cause as the council was of opinion the rule should be made absolute.

• It appeared that some twelve municipalities had already given debentures to the company amounting in all to \$340,000, and that the debentures under the Elderslie by-law had not been issued.

An affidavit of the township treasurer stated that the amount unpaid on the debentures issued under the three by-laws (which were school and drainage by-laws), amounted to about \$2,691.

After the rule *nisi* was granted an Act was passed during the last session of the Ontario Legislature respecting the railroad, 42 Vic. ch. 16, sec. 11, reciting all the by-laws passed by the different municipalities granting aid to the railway, including this by-law, and declaring them all, and the debentures issued or to be issued thereunder, to be valid, with this proviso, "Nothing in this section contained shall be construed to affect the application now pending in the Courts (*Lloyd v. Municipal Council of Elderslie*) to quash the said by-law, &c., and this section shall only apply to such by-law for the purpose of declaring the same to be legal and valid, in case the Courts should not quash the said by-law on the said application."

Robert Smith, of Stratford, appeared to shew cause on behalf of the Stratford and Huron Railway Company, and contended that the debts created by the three by-laws could not be considered as township debts, being for particular localities, which were liable under the School and Drainage Acts.

H. J. Scott, contra, referred to R. S. O. ch. 204, sec. 78.

April 15, 1879. HAGARTY, C. J.—It is represented on behalf of the railway company that the non-obtaining of this contribution from Elderslie will most seriously embarrass their operations.

The first existing by-law, to come into force 1st September, 1876, was to borrow \$600 for school purposes in section 12, and to issue debentures therefor, payable in five years, on the security of the special rate only.

The second by-law, to come into force 4th September, 1877, was to borrow \$1,650 on school section No. 3, and issue debentures payable in ten years, secured on a special rate.

The third by-law was finally passed 17th December, 1877, to raise \$2,013 for drainage purposes, and to issue debentures at ten years, and striking a special rate on a described section of land.

The total assessed value of the township is stated to be \$1,422,450, and the special rate for the railway bonus by-law is \$3,850.

It was argued that these three existing by-laws could hardly be considered as creating township debts, as they were for particular sections of territory which was specially and exclusively liable therefore under the School and Drainage Acts.

But they are, I think, clearly liabilities of the township as such. The township debentures are issued therefor and the debts are township debts. The school section or tract of land designated as the object of the expenditure, is the asset specially provided on which the township council is to levy the sum necessary to pay the debt which it has contracted; but it is still the debt of the municipality as a whole.

From the papers before me, and the arguments of counsel, I have formed the opinion that there was no intention whatever of doing anything wrong or concealing anything in framing the by-law in this manner. The subject of existing debt was before the mind of the draughtsman, as it is stated to amount to "Nil."

This, I think, arose from the idea that these small special rates, which had to be finally repaid by a particular section of territory, were not debts of the municipality at large. I think the idea was erroneous, but it was not an unlikely opinion to have been honestly formed. I therefore assume that every thing was done in good faith. The by-law is good on its face. I have now to consider whether I am bound to set it aside for the mistake that has been made.

From the well known case of *Grierson v. The Provisional Municipal Council of Ontario*, 9 U. C., 623, downwards, the Courts appear to have acted on the principle that where the by-law on its face appears to be legal and within the powers given by the Legislature, and following its general directions as to necessary declarations and provisions, without which it is not to be valid, (see section 330 Municipal Act,) the disclosure on affidavit of the non-compliance with certain requirements, or the inaccuracy of some statements, does not

make it the absolute duty of the Court to set it aside, but that it is to be dealt with according to judicial discretion exercised on all the facts.

This principle is fully stated by Draper, C. J., in *Secord and the Corporation of Lincoln*, 24 U. C. 147: "I agree" (he says) "with what is said by Burns, J., (in *Grierson v. The Municipality of Ontario*,) as to the extent to which the Court is bound to give way to objections which may be made to the legality of by-laws which depend upon extraneous matter; and where errors in computation only, even though extensive, were shewn, (the good faith in which the council were seeking to execute the powers given them being unquestioned), I should lean *totis viribus* to support their by-law, and especially where it had been acted upon. * * In the words of my late brother Burns, 'I am of opinion that the true construction to give to the powers vested in the Court to quash by-laws is, that unless the by-law be illegal on the face of it, it rests discretionary with the Court upon extraneous matters to say whether there is such a manifest *illegality* in it that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained.'"

In this case I find a by-law passed, as I think, in good faith, to raise \$35,000 for a lawful purpose, an unintentional omission to state an existing debt of about \$2,700, and an assessed value in the municipality of about one million and a half dollars.

The Legislature, to whom I presume I must impute a full knowledge of all the circumstances of the case, has declared that, subject to this motion to quash, this by-law is to be valid and binding,

In the exercise of the discretion which I think the Court have in judging such an objection as is here urged, I have come to the conclusion that I should not set aside the by-law; but as I consider there was an omission to state what ought to have been stated, I discharge the rule, without costs.

Rule discharged, without costs.

MACDONALD ET AL. V. THE QUEEN.

Petition of right—Contract with the Dominion before confederation--Liability.

A Petition of Right set out an agreement made in 1866 between the petitioners and the Queen, represented by the Commissioner of Public Works of Canada, for the performance and completion by the 1st of September, 1868, of the carpenter's work required on certain additions to the Provincial Lunatic Asylum at Toronto, and complained that owing to the delay in proceeding with other work, which the said commissioner promised to have done in time, they were delayed and unable to finish their work before July, 1870, and thereby put to great expense. They then alleged that their work was performed under the superintendence and control of the Commissioner of Public Works for Ontario, and for the sole benefit of, and paid for by that Province; and that by an arbitration held under sec. 142 of the B. N. A. Act in 1870, the said Asylum became the property of Ontario.

Held, that the Province of Ontario was not liable.

THIS was a petition of right, setting forth that under and by virtue of a certain agreement under seal, dated the 1st of March, 1866, made between the petitioners, of the first part, and Her Majesty Queen Victoria, represented therein by the Commissioner of Public Works of the then Province of Canada, of the second part, the petitioners contracted with Her Majesty to construct, complete and finish, in every respect, all the carpenter's and joiner's work in and about the erection and completion of the proposed east and west wings and Hospitals of the Provincial Lunatic Asylum, Toronto, according to the specification for the said work thereunto annexed, and according to the plan and drawings accompanying the same, and to have the said carpenter's and joiner's work on the said hospitals completed on or before the 14th of October, 1866, and to have the said carpenter's and joiner's work on the said east and west wings completed on the 1st of November, 1867; and to have the whole of the work under their said contract finished and delivered up by the petitioners on or before the 1st of September, 1868. And the petitioners alleged that the officer representing Her Majesty as aforesaid was, for and on behalf of Her Majesty, to make and complete the residue of the work in and about the said erection; and the petitioners submitted that it was the duty of the said

Commissioner of Public Works, and his successors in office, or other officer from time to time representing Her Majesty in or in respect of the said contract, to proceed with or cause to be carried on the stone work, brick work, plastering and other work to be done in and about the erection of the said buildings, so as to enable the petitioners from time to time to execute the work to be by them performed, and so as to enable them to complete the various buildings to be by them erected under the said contract, at the various times aforesaid, and so as to enable them to finish the whole of their work under the said contract, at the time aforesaid; and the said Commissioner of Public Works, and his successors in office representing Her Majesty, as aforesaid, promised so to do. And the petitioners shewed that they entered upon the execution of the work to be by them performed, and were ready and willing to proceed therewith: that thereupon it became the duty of the said Commissioner of Public Works, and his successors in office, or other officer representing Her Majesty as aforesaid, to proceed with the stone work, brick work, plastering, and other work to be by them performed, or cause to be done as far as was necessary, to enable the petitioners to complete their works by the time specified; but the said Commissioner of Public Works, and his successors in office, representing Her Majesty as aforesaid, delayed for such an unreasonable time in proceeding with such works, that the petitioners were delayed for so long a time in the carrying on of their said works, that the said hospitals, which were to have been completed by them under a heavy penalty by the time aforesaid, and which the petitioners were ready and willing to complete by that date had they been permitted so to do, were not made ready to be roofed in and enclosed by them until January, 1867, and the petitioners were obliged to roof in and enclose and finish the same in the most inclement season of the year, to wit, in the months of January, February and March, at a much greater expense than would have been required had the work been done in seasonable weather; and great loss and damage was

sustained in waiting so long for work which the petitioners were ready and willing to do as aforesaid.

And in further breach of the promise and duty aforesaid, the petitioners were delayed for so long a time in the carrying on of their said works, that the east wing aforesaid, which was to have been completed by them under a heavy penalty by the time aforesaid, and which the petitioners were ready and willing to complete by that date, had they been permitted to do so, was not made ready to be roofed in and enclosed by the petitioners until a long and unreasonable time after the said 1st of November, 1867, and the petitioners were obliged to roof in and enclose and finish the same during the winter of the year 1868-9, at much greater expense than would have been required had the work been done in reasonable weather, and great loss was incurred in waiting so long for work, which the petitioners were ready and willing to do as aforesaid. And the petitioners further shewed, that owing to various other delays in breach of the duty and promise aforesaid, the petitioners were unable for a long time to proceed with other portions of the work under their said contract, so that the work under their said contract, which the petitioners should have been permitted to finish before the 1st of September, 1868, and which they were ready and willing to do, owing to these various delays they were not permitted or enabled to finish before the month of July, 1870; by reason of which the petitioners sustained great loss and damage, were obliged to keep a staff of men and quantities of material on hand for the purpose of completing the said contract, not knowing at what time it would be necessary to proceed with and complete the same, and were obliged to pay largely increased prices for labour and material in the carrying out of their said contract, and were unable to take advantage of the low prices of material and labour, upon the basis of which they contracted for the said work, and the petitioners were unable to take other contracts, and sustained great loss and damage in various ways by reason of the work extending over so much longer a period

than before mentioned. And the petitioners alleged that the work performed by them as aforesaid was so performed under the superintendence, control and management of the officer from time to time representing Her Majesty in and for the Province of Ontario, to wit, the Commissioner of Public Works for the said Province, who assumed, on behalf of the said Province, the right to the fulfilment by the petitioners of the works in and by the said contract agreed to be done, and the said works were, at the request of the officer representing Her Majesty in and for the said Province, proceeded with and completed for the sole and exclusive use and benefit of the said Province, upon the terms, conditions and specifications in the said contract contained, and were paid for by the said Province, and were, upon completion thereof, delivered up to the officers of the said Province as representing Her Majesty, and had been, and still were managed, possessed, and controlled exclusively by the said Province. And the petitioners further shewed that under and by virtue of an arbitration held under the provisions of section 142 of the British North America Act, 1872, and of an award made thereunder and dated on or about the 3rd of September, 1870, the Provincial Lunatic Asylum aforesaid, upon and in respect of which the said work was done and contract made, became the property of, and belonged to, the Province of Ontario.

And the petitioners shewed that at the request of Her Majesty, as represented by the Attorney-General for the Province of Ontario, they made application to the officer representing Her Majesty in respect of the said matters for the Dominion of Canada, to wit, the Minister of Justice for the said Dominion, for his consent to become a party to said proceedings, in order that the respective liabilities, if any, between themselves of the Dominion of Canada in respect of the matters alleged, and of the Provinces of Quebec and Ontario, might be settled and adjusted in said proceedings; but the said officer representing Her Majesty for the Dominion of Canada as aforesaid, refused to become a party to said proceedings,

or to consent in any way to the adjustment of such liability, as aforesaid, in said proceedings. And the petitioners submitted that the direct liability, as alleged, of the Province of Ontario to them in respect of the matters alleged, could not be affected by the relative rights and liabilities between themselves, of the Dominion of Canada and the Provinces of Quebec and Ontario, in respect of the premises, but that such relative rights and liabilities, if any, remained unaffected by the determination of the matters alleged. And the petitioners claimed for money due by Her Majesty to the petitioners for work done, and materials provided by the petitioners for Her Majesty at the request of the officer representing Her Majesty for the Province of Ontario, and for money paid by the petitioners for Her Majesty at the request of the said officer representing Her Majesty as aforesaid, and for money found to be due from Her Majesty to the petitioners on accounts stated between the said petitioners and the officer representing Her Majesty as aforesaid, and for money payable by Her Majesty to the petitioners for interest upon money due from Her Majesty to the petitioners and foreborne at interest at the request of the officer representing Her Majesty as aforesaid.

The prayer of the petition was that they might be awarded damages in respect of the matters alleged.

Demurrer :

1. That no liability appeared on the part of the Province of Ontario or the Government of the Province of Ontario under the contract or contracts set out in the petition.

2. That it appeared from the petition that the late Province of Canada was and still continued liable under the contract set out in the petition, and the Dominion of Canada and not the Province of Ontario was liable for the debts and liabilities of the late Province of Canada.

3. That it was not shewn by the said petition that the said east and west wings and hospitals of the said Provincial Lunatic Asylum, Toronto, or any of the structures in the petition mentioned were, at the time when the alleged contract or contracts were made, the property of the Province of Ontario.

April 8th, 1875. *Edgar*, (*J. R. Cartwright* with him) for the demurrer, on behalf of the Crown. It is not sought to deprive the petitioners of the right of action, but only to ascertain if, under the B. N. A. Act, sec. 111, the Province of Ontario is liable upon a contract entered into with Canada before Confederation. The allegations in the petition bring the case within the class of implied contracts supported by *Yates v. Law*, 25 U. C. R. 562, and *Lee v. Bothwell*, 24 C. P. 109, but only so far as regards the old Province of Canada, and the Dominion as responsible for its liabilities. Ontario accepted the benefit of the work and became liable to pay for it, which was done. She derived no benefit from the breaches before Confederation now complained of, but the delays were injurious to her; besides, she has no remedy against other contractors with old Canada, whose delays caused the damage to petitioners. The Dominion, and not the Province of Ontario, is now liable for all breaches occurring before Confederation. The petition alleges that the property in the Lunatic Asylum, upon which the work was done by the petitioners, did not become vested in Ontario under the interprovincial award until 3rd September, 1870, and before that time the work was finished, and all damages resulting from breaches before or after Confederation had ceased. The mere taking charge of the work by an official of Ontario and payment to petitioners therefor by Ontario could not create a liability for damages arising out of breaches of the contract entered into by Canada. It might be that on a *quantum meruit* it was open to petitioners to show that over and above the contract price the Province should pay for the work done and accepted by them on measure and value, but this relief can be obtained under the common counts.

W. Macdonald, contra. It is admitted that as to breaches occurring prior to the B. N. A. Act no damage could be claimed against the Province of Ontario. As to breaches subsequent, the petition alleges, which on demurrer must be taken to be true, that the petitioners, at the request, &c., of the Province of Ontario, did certain work upon the terms

and conditions of the contract made with the old Province of Canada. The Province of Ontario, taking the benefit of that contract, must be bound by all its terms. It cannot avail itself of what is beneficial in the contract and repudiate terms which are onerous. The B. N. A. Act, sec. 142, and the Award dividing the assets of Ontario and Quebec, have nothing to do with erections built for and paid for by the Province of Ontario after Confederation. Neither Quebec nor the Dominion ever had any interest in these latter erections. They were built and paid for by the Province alone, and, as alleged, upon the terms of the contract in question ; hence Ontario is liable for breaches of that contract.

April 25th, 1879. HAGARTY, C. J.—The question for decision is, as to the liability of the Province of Ontario.

The contract was entered into long before the existence of Ontario, and the works on the hospitals were to have been completed, and all the delays complained of respecting them, occurred before such existence.

This first breach is given up by petitioners.

On the 1st July, 1867, the Province of Ontario came into existence under the British North America Act.

By sec. 111 the new Dominion became liable for all the debts and liabilities of each Province existing at the union.

Sec. 113 : The assets enumerated in the 4th Schedule belonging at the union to the Province of Canada shall be the property of Ontario and Quebec conjointly. This 4th Schedule comprises "Lunatic Asylums."

Section 142 declares that the division and adjustment of the debts, credits, liabilities, properties and assets of Upper and Lower Canada, shall be settled by arbitrators to be appointed, &c., &c.

The petitioners shew that they were improperly delayed, and all their damages had accrued, and their work not completed until July, 1870.

According to this, the Lunatic Asylum remained the

property of the Province of Canada, or rather the joint property of Quebec and Ontario, and it was not till some months after, viz., in September, 1870, it finally became the sole property of Ontario.

According to this petition there was a cause of action actually vested in the petitioners against the Province of Canada at the time of the union. This they concede they cannot sue for here.

Then they seem to rest their claim on the allegations that the officers of the new Province of Ontario assumed the right to control the execution of the works, and to require the petitioners to carry out their contract, and on the ultimate right of property subsequently vested in Ontario.

The promise not to delay the petitioners' work, and to enable them to complete it under the contract, is alleged to have been made by the Commissioner of Public Works for Canada, for himself and his successor in office.

I do not think we can hold that as a promise or contract binding on Ontario. The mere assumption of the superintendence and direction of the works of the Ontario officer would not, in my judgment, create the required liability.

The original contracting party, viz., the Crown, or the functionary representing the Crown, may have been willing, or may have arranged that the Ontario officials should assume the direction.

According to the petition, when the award was finally made and the Asylum became the sole property of Ontario, the whole cause of action had completely accrued.

If the petitioners then had claims for compensation, they would in my judgment have been based on the original contract and against the Province of Canada.

I think it might have been considered in the adjustment of "the debts, credits, liabilities, properties, and assets, of Upper and Lower Canada," in the words of sec. 142. I am not prepared to hold that when it was ultimately awarded to Ontario, the latter Province, without some express undertaking or engagement to that effect, became liable for large damages springing out of and based upon

an express contract to which it was no party, and made before it existed as a Province.

I think on the whole that the petition fails to disclose a good cause of action, and that there must be judgment for the Crown.

Judgment accordingly.

IN RE BANK OF ONTARIO.

34 Vic. ch. 5, sec. 25, D.—*Application for award of shares—Writ executed by bailiff and not by sheriff—Head office at Toronto—Sale in execution in Montreal.*

Upon an application by a bank, whose head office was in Ontario under sec. 25 of the Banking Act of 1871, 34 Vic. ch. 5, D., for an order adjudicating and awarding shares: *Held*, that an execution from the Superior Court of Montreal might be validly executed by a sworn bailiff of that Court, instead of by the sheriff, and the bailiff might fulfil the duty imposed on the sheriff, under sec. 19 of the Banking Act.

Held, also, that a sale in execution in Montreal might be made of shares of a Bank whose head office was in Toronto.

THIS was a petition by the Bank of Ontario, under sec. 25 of the Banking Act of 1871 (34 Vic. ch. 5, D.), praying that an order might be made adjudicating and awarding certain shares in the stock of said bank to the party or parties legally entitled to the same, pursuant to the said Act.

It appeared that one William Harper was, at the time of his death, holder of thirty-five shares in the capital stock of this bank: that by his will, dated 31st May, 1877, said Harper, after directing his debts to be paid, bequeathed the interest of this stock to his daughter, Sarah Jane Hannah, for life, and directed that at her death the princi-

pal should be divided, with the residue of his estate, as therein provided; and he appointed his said daughter and one James Cunningham his executors and trustees, with various powers, including power to sell bank stock, &c., &c.

Probate was granted on the 22nd June, 1877, to these executors.

One John Fair brought an action in the Superior Court, Montreal, and recovered judgment, on 31st December, 1878, against these executors, as such, and execution was issued for \$750.36, besides costs.

Execution was addressed to "any of the bailiffs of the Superior Court appointed and acting for the District of Montreal."

One Walter Reed, who was shewn to be a sworn bailiff of that Court, executed this writ or warrant, and sold in the ordinary way thirty-five shares of the capital stock of this bank, by auction, to one Foster. This stock was then and continued standing in the books in the name of the testator Harper. The bailiff first applied personally to Mrs. Harper (formerly Hannah) demanding payment; he also went to the branch or agency of the bank in Montreal, and informed Mr. Holland, the local agent, that he seized this stock, and left with him a copy of the warrant of execution and of notice of seizure, and afterwards served a copy of his "process verbal" and notice of seizure on Mrs. Harper, and a copy for Cunningham, the other executor, at the Prothonotary's office, Cunningham having no domicile in the Province of Quebec.

According to notice, on the 7th February, at the time and place therein named, he sold to Foster.

His notice to the parties stated that he was acting under ch. 70 Consol. Stat. of Canada.

The bank presented a petition to this Court, setting forth the facts of the seizure, &c., and that Foster, the purchaser, had endeavoured to obtain from the sheriff a certificate of the sale, pursuant to the 19th sec. of the Bank Act of 1871, but that the sheriff refused to give it, as the writ

of execution had gone to a bailiff, and the sheriff had not acted therein.

Notice was given that the petition would be presented on Friday, March 7th, 1879, or as soon thereafter as Court should sit or counsel could be heard, addressed to Foster, the purchaser, Fair, the execution plaintiff, and to the two executors, and that if they did not attend an order might be made in their absence.

On 28th February, this notice was served on Fair; on 7th March, it was served on Mrs. Harper, executor; on 14th March it came before the Court, but the acting executor had not been served; it was enlarged for a week; a fresh notice for 28th March was then given and served on Cunningham, the executor, on 22nd March; notice was served on Foster on 4th March.

After several further enlargements, on the 4th of April, *Falconbridge* appeared for the bank.

Holman, for the purchaser, James R. Foster. The only question raised on the petition is, whether a bailiff to whom the writ of execution was directed could sell the shares, so as to entitle the purchaser to have a transfer made under 34 Vic. ch. 5, sec. 19, D. Shares in incorporated companies are declared to be personal property, and to be liable to seizure under execution under the provisions of Consol. Stat. C., ch. 70. In sec. 2 of that statute it is provided that, "whenever any such share has been sold under a writ of execution, the *sheriff* * * * shall serve upon the incorporated company an attested copy of such writ of execution," * * and under sec. 19 of 34 Vic., upon such certificate being left with the bank, a transfer should accordingly be executed. Under the law of Quebec a bailiff has equal power with a sheriff in executing such process. See Code L. C., articles 565 and 566, and 33 Vic. L. C., ch. 17. The bank should have made the transfer on the certificate of the bailiff, and not have incurred the costs of this application.

The executors did not appear.

May 2nd, 1879. HAGARTY, C. J.—This petition is presented under the 25th clause, which is in substance, when any interest in shares shall be transmitted by a shareholder's death or otherwise, "or whenever the ownership of or legal right of possession in any such share or shares shall change by any lawful means other than by transfer," and the directors shall entertain reasonable doubt as to the legality of any claim to such shares, the bank may petition one of the Superior Courts of Law or Equity in the Province in which the head office of the bank is situated, setting forth the facts, &c., and praying for an order or judgment adjudicating and awarding the shares to the parties legally entitled, by which order or judgment the bank shall be guided and held fully harmless and indemnified, &c. Provided that notice shall be given to the party claiming such shares, who shall, upon the filing of such petition establish his right to the shares. Provided the costs shall be paid by the party to whom the shares shall be declared to belong, and such shares shall not be transferred until such costs are paid, saving the recourse of such party against any party contesting his right.

By sec. 24 the executors, by leaving with the bank a copy of the probate (producing also the original), could have at once procured a transfer. This was never done.

The difficulty suggested by the bank's legal advisers was apparently wholly caused by the fact that the writ was executed by a bailiff and not by the sheriff.

By sec. 19 the shares are declared to be personal estate, assignable, &c., at the chief place of business, or at any branch the directors may appoint, &c.

When sold in execution *the sheriff* by whom the writ shall have been executed shall, within thirty days of sale, leave with the cashier, manager, or other officer of the bank, an attested copy of the writ, with the certificate of the sheriff endorsed thereon, certifying to whom the sale was made, &c., and thereupon (but not before all debts due by the stockholder to the bank be discharged) the president, vice-president, manager, or cashier, shall execute the transfer of the share so sold to the purchaser, &c., &c.

Sec. 20. A list of all transfers registered each day shall be made up at the end of each day and kept at the chief office for inspection of shareholders.

On the hearing of the application the only difficulty suggested was, whether the proceedings of the bailiff and his notices and certificates were sufficient under the statute, which speaks solely of the sheriff.

As to this the Quebec statute is relied on, 33 Vic. ch. 17, which provides that all writs of seizure in execution, &c., &c., from the Superior or Circuit Courts may be addressed either to the sheriff or to any bailiff of the district, and may be by them served or executed in such district. (This modifies sec. 555 of the Code.)

There is also an affidavit from a Quebec advocate that the bailiff was legally authorized to act and sell in the same way as the sheriff.

It seems clear that the sale and all proceedings thereunder could be as lawfully conducted by the bailiff as by the sheriff. The property would pass to the purchaser as well as if he bought from the sheriff. The only question would be as to the statutable means for perfecting his title in the bank books.

If the case presented nothing but this, I think I might safely hold that the officer placed by the Legislature in exactly the same position, and apparently with the same powers as the sheriff in the execution of final process, may properly fulfil the duty imposed on the sheriff in reference to bank stock.

Such a view is, I think, most in accordance with a liberal construction of statutes and with the spirit of the Interpretation Act.

But under the large powers given by the 25th sec. of the Banking Act I feel little difficulty on that point.

A point not suggested in the argument has given me some doubt, viz., whether a sale in execution in Montreal affected shares in a bank whose head quarters are in Toronto.

If the matter rested on the Banking Act, 34 Vic. alone, I should consider that the shares were personal estate in

the county in which the head office may be. They are a defined interest in an incorporated partnership. I can hardly understand them as personalty in any other place than the locality or domicile of the business.

The original charter of this bank, 1857, 20 Vic. ch. 159 sec. 20, as to shares, their transfer and seizure in execution, is almost verbatim the same as the general sec. 19 in 34 Vic.

I have nothing before me to shew that the directors have appointed any other place for transfer except the head office. See sec. 20 as to the daily list of transfers.

Consol. Stat. Can., ch. 70, professes to apply to all incorporated companies for purposes of trade and profit. Sec. 2 declares that when any shares are sold the sheriff by whom the writ has been executed shall within ten days of sale serve upon the incorporated company, "at some place where service of process upon such company may be made," a copy of the writ, &c., &c.

Sec. 5 declares the shares shall be held to be "personal property," found by the sheriff in the place where notice of the seizure thereof may be made as aforesaid.

Sec. 4 provides that when the company has more than one place where service of process may be legally made, and when there be some place where transfers of stock may be notified to and entered by the company other than the place where service of the notice has been made, such notice shall not affect any transfer, &c., till after reasonable time for transmission of the notice, &c., &c.

Consol. Stat. C., ch. 55, Freedom of Banking Act, declares the shares in joint stock banks liable to seizure, &c., under the provisions of this last cited Act as to seizure of shares in incorporated companies.

The Revised Statutes Ontario, ch. 66, (after referring to schedule A, which repeals the whole of this Act, ch. 70, p. 2273,) provides for seizure and sale of shares "in any incorporated bank or other company in Ontario," sec. 20 repeating the provisions in substance, and sec. 23 declares that shares shall be personal property found by the sheriff in the place where notice of seizure is served.

The corresponding sec. 21 omits the words in sec. 2 of ch. 70, Consol. Stat. C., "at some place where service of process may be made, &c., &c., but sec. 22 repeats the provisions of sec. 4 of ch. 70.

This ch. 70 is thus repealed as concerns Ontario, but as I understand is still in force in Quebec.

Therefore it seems to stand thus under ch. 70, that where service of process can be legally made on the company the shares may be seized and notice given.

Our C. L. P. Act, R. S. O., ch. 50, sec. 21, directs that a writ may be served on the cashier, manager, treasurer or secretary, clerk or agent of such corporation, or of any branch or agency thereof in Ontario.

I am referred to the Quebec Code.

Sec. 61 declares that "service on a joint stock company may be made at its office, speaking to a person employed in such office, or elsewhere upon its president, secretary, or agent." Sec. 62 says if partnership have no known office, &c., service may be allowed in advertising, &c.

Sec. 63. "Service upon a body corporate is made in the manner provided by its charter, and in the absence of such provision, in the manner prescribed in the two preceding articles."

Sec. 64. "Foreign companies or corporations, &c., may, if they have an office or an agent in Lower Canada, or carry on business therein, be summoned there in the manner provided in article 61."

Sec. 566. "Seizure of shares in any financial, commercial, or industrial company, &c., is made by serving *such* company with a copy of the writ of execution, &c."

Sec. 567. If there is more than one place at which the company may be served, &c.—following secs. 3 and 4 of ch. 70 Consol. Stat. C., when service is made elsewhere than at the place where transfers are made, &c.

An affidavit has been furnished of a Montreal legal practitioner, to the effect, that by the laws of Quebec service of process on the Ontario Bank could be legally effected on the agent at their branch in Montreal.

As there was some difficulty as to the service of notice on the executrix, a further notice has been served, requiring her to shew cause, if any she had, within a week from the time of service. This time has now expired.

I think, on the whole, that the order asked for may be granted.

The rule will be, that these thirty-five shares in the capital stock of the bank are adjudicated and awarded to the said James R. Foster, the purchaser in execution, and that the proper officers shall execute a transfer of said shares to said purchaser Jas. R. Foster.

I am sorry that this application has necessarily involved considerable expense. I see no reason why the bank should not be paid their costs under sec. 25.

Judgment accordingly.

BOUSTEAD V. JEFFS.

Promissory note—Stamps—Pleading.

Declaration on a pro-note. Plea, that the note was not properly stamped, and that plaintiff, the endorsee, did not pay double duty as soon as he acquired knowledge. Replication—that although the plaintiff, when he became the holder had knowledge of the facts stated in the plea, yet it was through error or mistake he became holder with such knowledge, and as soon as he discovered the error he paid the double duty : *Held*, replication bad, as not tendering any certain or intelligible issue.

The third plea alleged that the date which the note purported to bear was not the date on which it was made, but it was made and delivered to the plaintiff on a day long subsequent, and at that time had stamps affixed to the required amount, on which a false date, *i.e.*, the date named in the note, was written instead of the true date of affixing.

A similar replication to this plea was *held* good, because the plea did not in terms allege that the duty had not been paid.

Semble, that the plaintiff might have the protection of the statute under a traverse.

DECLARATION by endorsee of a promissory note.

Pleas—1. That the said promissory note was made in Canada, to wit, in the Province of Ontario, and there was not affixed thereto at the time of the making an adhesive stamp or stamps to the value of twelve cents, as required by the statute in that behalf, or any stamp whatever, nor was the said promissory note made on paper properly stamped in the manner and to the amount of duty required by the said statute, or to any amount of duty whatever; and the plaintiff did not, as soon as he acquired the knowledge that the proper duty had not been paid thereon by affixing such stamp or stamps at the proper time, pay the double duty thereon by affixing to the said promissory note an adhesive stamp or stamps to the amount thereof, and writing thereon the name or initials of the plaintiff or the day on which they were affixed; and the said promissory note, by reason of not having such stamp or stamps, is invalid in law and equity.

2. That at the time of the making of the said promissory note the duty thereon had not been paid by affixing thereto a stamp or stamps to the amount of duty payable

thereon, or any stamps, and afterwards stamps purporting to be for the amount of duty payable thereon, to wit, twelve cents, were affixed to the said promissory note, and a false date, to wit, the date on which the said promissory note purported to have been made, was written upon said stamps, instead of the true date at which the said stamps were so affixed, of which the plaintiff then had knowledge, by reason whereof the said promissory note became and was invalid in law and equity.

3. That the 3rd day of October, 1878, which the said promissory note purported to bear, was not the day on which the said promissory note was made, but the same was made and delivered to the plaintiff upon a day long subsequent to the said 3rd day of October, and at the time the said note was so made and delivered to the plaintiff stamps to the amount of duty required to be paid upon the said promissory note were affixed thereto, and a false date, to wit, the date on which the said note purported to have been made, was written upon the said stamps instead of the date at which the said stamps were so affixed, by reason whereof the said promissory note was invalid in law and equity.

Replication. That although at the time he became the holder of the said promissory note he had knowledge of the circumstances set out in said plea, yet it was through mere error or mistake, and without any intention on the part of the plaintiff to violate the law, that the said plaintiff became the holder of the said promissory note stamped and in the state as set out in said plea; and that so soon as he became aware of such error or mistake, to wit, on the 21st day of March, 1879, he did pay double duty thereon by affixing to the said promissory note stamps to the amount of such double duty, to wit, the sum of twenty-four cents, and duly cancelled the same by writing on each of the said stamps his initials and the day on which they were so affixed, according to the statute in that behalf.

Demurrer. 1. That the question whether the error or mistake of the plaintiff was excusable, and whether there

was or was not an intention on the part of the plaintiff to violate the law, is a question for the consideration of the Court or Judge, and is not a matter to be pleaded and tried between the parties.

2. That the replication admits the knowledge of the facts set out in the second plea at the time when he received the said note, and the plaintiff's subsequent payment of the double duty is insufficient in law, and no answer to the plea.

3. That the replication tenders an immaterial issue.

4. That the error or mistake set out in the replication was not such error or mistake as was contemplated in and excusable under the Act respecting the imposition of duties on promissory notes and bills of exchange.

13th May, 1879, *Bigelow*, for the demurer, cited *Hoffman v. Ringler*, 29 U. C. R. 531; *Siorlet v. Kuczynski*, 17 C. B. 251.

Akers, contra, cited *Waterous v. Montgomery*, 36 U. C. R. 1; 31 Vic. ch. 9, sec. 4, D.; 37 Vic. ch. 47, D.

23rd May, 1879. HAGARTY, C. J.—The statute relied on by plaintiff is 37 Vic. ch. 47, sec. 12, D., which is in substance, that where the validity of the instrument is questioned by reason of the proper duty thereon not having been paid at all, or not paid by the proper party or at the proper time, or of any formality as to date or erasure of the stamps affixed having been omitted, or a wrong date placed thereon, and it appears *that the holder, when he became holder, had no knowledge of such defects*, such instrument shall be held valid if it appears that the holder thereof paid double duty *so soon as he acquired such knowledge*, &c., &c. And if it shall appear to the satisfaction of the Court or Judge, as the case may be, that it was through mere error or mistake and without any intention to violate the law on the part of the holder that any such defect as aforesaid existed in relation to such instrument, then it shall be held valid, &c., *if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake.*

Here in the first plea the defence is that the note at the time of making was not properly stamped, and the plaintiff, (an endorser) as soon as he acquired the knowledge that the proper duty had not been paid, did not pay the double duty, by affixing stamps and writing his name or initials, or the date of affixing, &c.

This shews a good defence.

I think that under a traverse of this plea the plaintiff might gain the protection of the statute, if the evidence shewed that as soon as he became aware of a legal defect from a non-stamping or irregular stamping, he affixed the required double stamps, and that this occurred through mere honest error or mistake.

I think he could also reply, to rebut the *primâ facie* defence shewing that this provision of the Act of 1874 applied to him, as to honest error or mistake. For instance, if a man become the holder of a note that he sees is not stamped, but is ignorant of or mistakes the law as to stamps, &c., and as soon as he discovers his mistake promptly corrects it by paying the double duty, &c.

Here the plaintiff replies that although he had knowledge that *the proper duty had not been paid*, yet that it was through mere error or mistake and without intention, &c., that he became holder with such knowledge that *the proper duty had not then been paid*, and that as soon as he became aware of such error or mistake he paid the double duty, &c., &c.

The replication confesses the statement that the plaintiff did not pay the double duty as soon as he acquired the knowledge that it had not been paid, and seeks to avoid it by saying it was through error or mistake *he became holder with such knowledge*, and as soon as he discovered the error he paid the double duty.

I hardly understand this way of putting it. If he "knew the proper duty had not been paid," was he not bound at once to repair the error?

The statute says, "Where the holder, when he became such holder, had no knowledge of such defects," then if he pay the duty "so soon as he acquired such knowledge."

I find it difficult to see how the saving clause as to honest error or mistake applies to a case where the holder took the note knowing that the proper duty had not been paid, or, in other words, fully aware of the legal defect and failure to comply with the Stamp Acts.

If he could have gone on to aver that by some ignorance or error in judgment he thought that though the legal defect existed it would not affect a party in his position, or something to that effect, I could understand it. But will it suffice to admit full knowledge of legal defects, and get rid of all the consequences merely by saying it was by mere error that he became holder with such knowledge? What was the error or mistake? He says it was in becoming holder with such knowledge.

I do not think this replication can be supported. It does not present or offer any certain or intelligible issue, so as in my opinion to bring it within the statute.

The second plea states that when this note was made the duty thereon was not paid by affixing any stamps, and afterwards stamps were affixed at a false date, *i. e.*, the date on which the note purported to be made, instead of the true date of actual affixing, of which plaintiff then had knowledge, by reason whereof the note became void.

To this the plaintiff replies, that although when he became holder *he had knowledge of the circumstances* set out in the plea, yet it was through error or mistake, &c., he became the holder of the note in the state mentioned in the plea, and as soon as he became aware of such error he paid the double duty, &c.

All I have said as to the replication to the first plea applies to this. He was aware when he took it of the legal defects, and that the duty had not been properly paid. I cannot see how he brings himself under the protection of the statute, as he has chosen to state his answer.

The third plea states that the date the note purports to bear is not the date at which it was made, but it was made and delivered to plaintiff on a day long subsequent, and when so made and delivered to the plaintiff stamps to the

required amount were affixed thereto, and a false date, *i.e.*, the date named in the note, was written thereon instead of the true date of affixing, whereby it became void.

The replication is the same exactly as to the second plea.

This third plea does not aver *in terms* that the duty had not been paid.

The replication admits, not, as in the other replications, that when he became holder he had knowledge that the proper duty had not been paid, but that he had knowledge of the affixing the stamps and cancelling them as of the date on the face of the note, and not the actual date of affixing, but that he became holder through error and mistake, &c., &c.

As a matter of fact the stamps were duly affixed on the actual day of making and of delivery to plaintiff as holder; the only error was in cancelling the stamps as of the professed date, some days back, and not as of the date of actual affixing; so that the error and mistake may be fairly referable to the method of cancelling, the true duty being actually paid.

I think I may venture to uphold the replication to the third plea, but not the others.

Judgment for the plaintiff on the replication to third plea, and for defendant on the replications to first and second pleas.

Nothing but the costs are at stake, as I understand there is a traverse on the record to each of the pleas.

Judgment accordingly.

EASTER TERM, 42 VICTORIA, 1879,

From May 18th to June 6th.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

KANADY V. THE GORE DISTRICT MUTUAL FIRE INSURANCE
COMPANY.

24%

Insurance—Assignment of policy—Avoidance.

The assignee of a policy of insurance, who is not interested in the property insured, does not by such assignment and the assent of the insurers thereto become the insured under the policy, and the policy still remains liable to be defeated by a breach of the conditions by the assignor.

A policy of insurance was issued by the defendants on the cash system, containing the usual conditions against subsequent insurance and alienation of the property insured, and was assigned by the insured to E. M., with the consent of the defendants. E. M. after the loss occurred assigned to the plaintiff. The assignor subsequently mortgaged the property insured, effected a further insurance upon it and then conveyed his equity of redemption. The defendants pleaded these facts as constituting respectively defences to the policy. The plaintiff replied that they all occurred after the assignment of the policy to E. M. and the defendants' assent thereto:

Held, that inasmuch as the plaintiff was not interested in the property insured, the acts of the assignor avoided the policy.

The defendants pleaded also that by alienation of the property insured by way of mortgage the policy was avoided under R. S. O. ch. 161, sec. 41.

Held, that a transfer by way of mortgage came within the Act, and avoided the policy in the hands of the plaintiff as assignee.

The defendants further pleaded, on equitable grounds, that the policy had been assigned to E. M. by way of collateral security to a mortgage on the insured property made to him by R. & F.: that R. & F. subsequently assigned their equity of redemption and their interest in the

property subject to the mortgage to R. & M., who became the insured under the policy subject to the mortgage: that R. & M. subsequently effected further insurances without consent or notice to defendants, and that after the loss the mortgage to E. M. was paid by R. & M., the owners of the equity of redemption: that the policy was thereupon assigned to the plaintiff, who sued as trustee for R. & M., and that as to R. & M. and the plaintiff, who sued as their trustee, the policy had been avoided by their acts: *Held*, a good defence.

This was an appeal from a judgment of Gwynne, J., sitting for the full Court. The questions involved arose on demurrer, which was originally argued on the 19th November, 1878, by *McMichael*, Q. C., for the plaintiff, and *F. Osler*, for the defendants.

The pleadings are fully set out in the judgment appealed from.

May 26, 1879. *McMichael*, Q. C., for the appeal, cited *Mechanics Building and Savings Society v. Gore District Mutual Fire Ins. Co.*, 3 App. R. 151.

Bethune, Q. C., contra, was not called upon.

January 7, 1879. GWYNNE, J.—The plaintiff sues as assignee of a right of action, after loss, from an assignee, before loss, of a policy of insurance effected with the defendants by the owner of certain chattel property for securing indemnity against loss by fire, such policy having been assigned to the plaintiff's assignor with the consent of the defendants, the insurers. The plaintiff in his declaration claims the whole amount of the insurance, viz., \$1,000.

The questions arise upon a demurrer to a rejoinder to a replication to the second, third, fourth, fifth, and sixth pleas; and upon a demurrer to the replication to the tenth and eleventh pleas, and upon exceptions taken to the tenth and eleventh pleas.

I shall have occasion to draw attention to the special frame of the pleadings by and bye, but for the present merely observe that the points argued before me were, 1st. Whether or not a mortgagee, to whom a policy of insurance, effected by the mortgagor, had been assigned with the assent of the insurers, can, upon the occurrence of a loss,

be defeated, in an action brought upon the policy, by an act committed by an assignee of the equity of redemption of the original insured, subsequently to the assignment in violation of the terms and conditions of the policy. Secondly, whether the matters pleaded here by the pleadings, out of which the demurrer arose, constitute a bar to such recovery in whole or in part; and thirdly, assuming that they do as to a part, but not as to the residue, whether or not the assignee's right to recover in respect of such residue, it consisting solely of the mortgagee's own interest as a creditor of the insured, is defeated by the payment of his mortgage debt by the assignee of the equity of redemption of the insured in the insured property, such payment having been made after the loss by fire occurred, but before action.

I have searched in vain to find a case, and I venture to affirm that none can be found, wherein it has been decided in any English Court that a mortgagee of property upon which a policy of insurance had been effected by the owner and mortgagor, and which policy has been assigned to the mortgagee as collateral security for his mortgage debt, can, in case of a loss occurring, recover the amount secured by that policy, or any part thereof, otherwise than in right of the insured mortgagor, and subject to the conditions contained in the policy. In England such an assignee is regarded the assignee of a chose in action only, and as such he is entitled to recover only in right of the insured, and subject to the conditions contained in the policy. This also appears now to be well established law, as the same is administered in the Supreme Courts of the States of Massachusetts and Pennsylvania, and in the Supreme Court of the United States. In *Edes v. The Hamilton Mutual Ins. Co.*, 3 Allen 362, it was decided, in 1862, by the Supreme Court of the State of Massachusetts that when the owner of property insured with a mutual insurance company subject to the by-laws of the company, mortgages the property and assigns the policy to the mortgagee, with the assent of the company, and afterwards, in violation of the by-laws, executes a second mortgage to a third person,

without the consent of the company, the mortgagee to whom the policy had been assigned with the consent of the company could not recover under the policy upon a loss occurring. The Court held that there was nothing to distinguish such a case from an ordinary assignment of a chose in action, and that the assignee could only claim in the right of the original insured.

In *Lawrence v. The Holyoke Ins. Co.*, 11 Allen, 387, it was decided by the same Court, in 1865, that the sale by a mortgagor of his equity of redemption in the insured property avoided a policy which had been effected, by him, although it had been assigned to a mortgagee with the assent of the company who were the insurers. In *Roberts v. The State Mutual Fire Ins. Co.*, 31 Penn. Rep. 438, it was decided by the Supreme Court of the State of Pennsylvania, in 1858, that where a policy of insurance against fire was assigned to a mortgagee with the assent of the company insuring, the assignee, in case of loss, can only recover where the assignor could have done so, had no assignment been made, and that the assignee takes it subject to all the stipulations of the contract, and that consequently the policy was avoided by the mortgagor effecting a second insurance upon the property without the assent of the company. The Court giving judgment there say: "A policy of insurance is assignable only in equity, consequently the assignee takes it subject to all the equities which existed between the original parties at the time of the assignment and notice thereof; but it does not follow from this that by the assignment and notice the underwriters are deprived of the continued protection of the stipulations of their contract. *These are not equities*, they are legal rights which are cut off by no transfer of the instrument. The assignment does not change the contract: it simply converts one of the parties into a trustee for a third person, every condition precedent upon which the liability to pay is made to depend, remains as before." And again they say: "Even in Massachusetts, where an assignee of a policy assigned, with the consent of the insurers,

is permitted to sue in his own name, it is settled that the assignor is the person who continues to be insured, notwithstanding the assignment ;” and they say that although in the State of New York it had been held that the assignment of a policy, with the assent of the insurers, constituted a new policy with the assignee, yet that doctrine was now completely exploded, and was no longer authority in New York.

The same is laid down in *May's* last edition of the Law of Insurance. In *Carpenter v. Providence Washington Ins. Co.*, 16 Peters, at p. 501, the Supreme Court of the United States, in 1842, said : “ No doubt can exist that the mortgagor and mortgagee may each separately insure his own distinct interest in the property ; but there is this important distinction between the cases, that where the mortgagee insures solely on his own account, it is but an insurance of his debt, and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation, and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby ; neither can the mortgagor take advantage of the policy, for he has no interest whatever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee if it does not exceed the insurance ; but then, upon such payment, the underwriters are entitled to an assignment of the debt to the mortgagee, and may recover the same amount from the mortgagor. If then a mortgagor procures a policy on the property against fire, and he afterwards assigns the policy to the mortgagee with the consent of the underwriters, if that is required to give it validity, as collateral security, the assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due in case of loss, but it does not displace the interest of the mortgagor in the premises insured ; on the contrary, the insurance is still his insurance, and on

his property and for his account, and so essential is this that, if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein, and then a loss should occur, no recovery can be had against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy." And again: "It is clear, both upon principle and authority, that an assignment of a policy by the insured only covers such interest as he may have at the time of the insurance, and at the time of the loss. It is the property of the insured and his alone that is designed to be covered, and when he parts with his title to the property he can sustain no further loss or damage by fire, but the loss, if any, must be that of his estate. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor;" and they refer to *Lynch v. Dalzell*, 4 Bro. Par. Rep. 432, and *The Sadlers' Co. v. Badcock*, 2 Atk. 554, as laying the foundation from which the above conclusions are drawn.

In *Chisholm v. The Provincial Ins. Co.*, 20 C. P. 11, and in *Smith v. The Niagara District Mutual Ins. Co.*, 38 U. C. R. 570, I have expressed my opinion upon this subject, which is in perfect accord with the above decision, and with that of *Rolt v. White*, 9 Jur. N. S. 343-5-6, where Lord Westbury says, that "if the chose in action assigned consists of a legal right to recover and obtain payment of money", (which is precisely what a policy of insurance against loss by fire is), "that legal right is transferred to the assignees, and they are simply in the same position and subject to the same conditions by which the assignor could sue under it."

In *Smith v. Niagara District Mutual Ins. Co.*, I expressed also my opinion as to the effect which recent legislation, especially the Act 36 Vic. ch. 44, Ont., amending and consolidating the laws relating to mutual fire insurance companies has upon the decision in *Burton v. The Gore District Mutual Ins. Co.*, 12 Gr. 156, and this opinion has

been recently affirmed by the judgment of the Court of Appeal in *The Mechanics' Building and Savings Society v. The Gore District Mutual Fire Ins. Co.*, 3 App. R. 151.

However, *Burton v. The Gore District Mutual Ins. Co.* could not, as it appears to me, irrespective of recent legislation, govern in any case except in one precisely similar in its circumstances ; that is to say, where the premium note of the original insured is given up and cancelled, and a new premium note is given by the mortgagee to whom the policy is confirmed anew by the insurers. That was the state of the facts upon which that case proceeded, and any authority which it may have, if any it has in view of recent legislation, must be confined to cases in which the same state of facts appears.

Now the right in virtue of which the plaintiff seeks to recover is stated in the declaration, in short substance, as follows :—

That upon the 10th day of March, 1875, certain persons trading under the name and firm of Messrs. Robinson, Smedley & Co., paid the sum of \$20 to the defendants, who, in consideration thereof, granted to them a policy of insurance against loss by fire upon certain machinery and other chattel property mentioned in the policy, (of which Robinson and Smedley then were owners,) for the period of nine months, ending on the 5th of December, 1875 : that such policy was made subject to certain conditions set out in the declaration, amongst which was one to the effect, that if the assured should thereafter effect any other insurance upon the property thereby insured, without the consent of the company endorsed on the policy, or if the assured were not the sole and unconditional owners of the property insured, unless the true title should be expressed on the policy, the policy should be void : that afterwards the said Robinson, Smedley & Co., for valuable consideration, assigned, transferred, and set over, all their right, title, and interest in the said policy, and all benefit and advantages to be derived therefrom, unto one Edward Moore, and his assigns, to which assignment the defendants, by writing endorsed

on the policy, assented: that while Moore was so possessed of the policy the insured property was destroyed by fire, and that afterwards Moore, by a proper instrument, granted, assigned and set over unto the plaintiff, as trustee of a firm called Robinson and McDonald, the said policy, and all right, title, and interest of the said Edward Moore therein: that all conditions have been fulfilled, and all things have happened entitling the plaintiff to recover, as such Trustee, the amount of the policy, viz. \$1000.

It is to be observed that upon this declaration no interest in the insured property is alleged to have ever been assigned or transferred to, or to have become vested in Moore, the assignee of the policy; consequently, upon this declaration Moore must be taken to have had no interest in the insured property, but to have been a mere assignee of the beneficial interest which, in case of loss occurring, Robinson Smedley & Co. might then have to recover under the terms and conditions of the policy. So, likewise, no interest is asserted in the declaration in Robinson and McDonald in the insured property, nor is any connection as existing between them and Robinson, Smedley & Co. stated. Upon this declaration they must be taken to be total strangers, and to have no interest in the insured property, nor in the policy either, otherwise than in virtue of the assignment alleged to have been made of such interest as Moore had therein; and as Moore's right was simply identical with such right as Robinson & Smedley had at the time of the loss occurring in virtue of the terms of the policy, so also must the plaintiff's title, so far as appears in the declaration, rest upon the same right of Robinson, Smedley & Co.

To this declaration, such being the right sought to be enforced thereby, the defendants plead:

For second plea: That after the making of the said policy, the insured effected a further insurance for \$746, or thereabouts, in the Canadian Mutual Insurance Company, on the property by the policy insured, without the consent of the defendants endorsed on the said policy, contrary to the said condition, whereby the policy declared upon became and is void.

And for the third plea: That the defendants are a Mutual Fire Insurance Company, under the Act relating to Mutual Fire Insurance Companies in Ontario, and that the insurance in the Canadian Mutual Fire Insurance Company in the last plea mentioned, and the insurance in the declaration mentioned, under the policy in the defendants' company, subsisted by the Act, and with the knowledge of the insured under the said last mentioned policy, at the same time; and such double insurance did not subsist with the consent of the directors of the defendants' company, signified by endorsement on the policy signed by the defendant company's secretary, or other officer duly authorized to do so, or otherwise acknowledged in writing, whereby the said policy is void.

And for fourth plea: That one of the conditions of the said policy was and is, that the interest of the insured in the said policy is not assignable without the consent of the defendants' company in writing, or if the title to the property insured be transferred or changed otherwise than by succession, by reason of death, without written permission of the defendants' company endorsed thereon, the said policy should be void; and the defendants say that after the said policy the title of Robinson, Smedley & Co., the insured named in the said policy, to the said property thereby insured was transferred and changed by them to the said Robinson and McDonald, and such change or transfer was not a succession by reason of death, and the defendants did not assent thereto in writing or otherwise, whereby the said policy is void.

And for fifth plea: The defendants repeat the statement in the last plea down to and inclusive of the words, "*the said policy should be void,*" and say that after the said policy the said property thereby insured was by the insured alienated and transferred by a sale thereof by way of mortgage to certain persons trading under the name of Thompson, Smith & Co., and the defendants' company did not assent thereto in writing or otherwise, whereby the said policy is void.

And for sixth plea: That the defendants are a Mutual Fire Insurance Company under the Act relating to Mutual Fire Insurance Companies in Ontario, and that after the said policy, the property thereby insured was alienated by sale or transfer thereof by way of mortgage to certain persons trading under the name of Thompson & Company, whereby the said policy became and was and is void.

The replication to these pleas, (the rejoinder which is demurred to) by way of meeting the respective grounds of defence relied upon in the several pleas, avers that all the matters in the said several pleas mentioned, took place and happened while the said Edward Moore was assignee of the said policy, as in the declaration mentioned, and after the assignment thereof to the said Moore, with the assent of the defendants, and that the right and title of the said Moore, as such assignee, was not affected, invalidated, or defeated by the said several matters in the said pleas alleged, and the plaintiff is entitled as assignee of the causes and rights of action in the said Moore vested, as assignee of the said policy, by reason of the said fire, and the loss thereby sustained.

The whole material part of this replication is comprehended in the allegation, that all the matters in the said several pleas mentioned happened after the assignment of the policy to Moore, with the assent of the defendants. That is the sole matter of fact alleged in the replication. The replication in effect admits the truth of the several matters pleaded in the second, third, fourth, fifth, and sixth pleas, but seeks to avoid the pleas by setting up the new fact alleged, namely, that all took place after the assignment of the policy to Moore. Whether that matter, assuming it to be true, would or not have the effect of invalidating and defeating or of supporting the right and title of Moore to recover under the policy, is a question of law and not of fact. The replication, however, repeats the assertion of the title of the plaintiff to recover, as it is averred in the declaration, namely, that such title is only asserted in right of the causes and rights of action vested in Moore, as assignee of the policy.

Now, the interest of Moore as, although with the consent of the defendants, mere assignee of the policy, but having no interest in the insured property, being an interest which, beyond all question, could only be asserted in the right of the original insured, that is to say, Robinson, Smedley & Co., and to the same extent only as they could assert a right to recover if there had been no assignment of the policy, it is obvious that this replication offers no answer whatever in law to the matters alleged in the several pleas numbered from two to six, inclusive; but the defendants have not demurred to the replication; on the contrary, they have pleaded certain matters of fact by way rejoinder thereto, and although their rejoinder has been demurred to, they have not filed exceptions to the replication; and the question now is, how should I deal with the series of pleadings, upon a demurrer to a rejoinder to a replication, which replication itself sets up no answer whatever in law to the pleas, to which it is pleaded, and yet is not demurred to, nor have exceptions been taken to it.

The rejoinder, which is professed to be pleaded upon equitable grounds, alleges as matter of fact that the policy was assigned to Moore by Robinson, Smedley & Co. as additional or collateral security for payment of a certain mortgage made by them to him of the insured premises, to secure payment of the sum of \$500, and that the defendants permitted the said policy to remain in force and to be transferred to Moore by way of additional security for such mortgage, pursuant to the provisions in that behalf of the act relating to Mutual Fire Insurance Companies in Ontario, which assignment and permission are the assignment to Moore, and the defendants assent thereto in the declaration and replication mentioned, and Moore was interested in the insured premises and in the policy to the amount of the sum of \$500 and no more; and subject to the said mortgage the said Robinson, Smedley & Co., until they transferred and assigned the said insured premises to the said Robinson & McDonald, and subsequently to such transfer and assignment to them they the said Robinson &

McDonald were and continued to be interested in the said insured premises as owners of the equity of redemption therein, and no person or persons, other than the said Robinson, Smedley & Co., Edward Moore, and Robinson & McDonald ever was, or were at any time before the said loss interested in the said policy ; and that before or at the time of the assignment of the said policy to the plaintiff by Moore the mortgage to Moore was paid, satisfied, and discharged by or on behalf of Robinson & McDonald, and the plaintiff sues in this action to recover the amount of the policy for the benefit of the creditors of Robinson & McDonald and not otherwise.

This rejoinder certainly appears to manifest the existence of considerable doubt on the mind of the pleader as to the respective rights of the plaintiff and of the defendants under the circumstances. It sets up a matter relative to the character of Moore's interest in the policy not averred in the declaration by the plaintiff himself in support of his claim under Moore, and not previously appearing in any of the pleas in the introductory part of the rejoinder mentioned, in the second, third, fourth, fifth, and sixth pleas. In the declaration the plaintiff had relied upon the assignment of the policy to Moore as to a person having no interest in the insured property, none such being alleged, but as beneficially interested in the money, if any should become payable to Robinson, Smedley & Co., under the policy.

Pleas then which would defeat the right of Robinson, Smedley & Co., to recover if they had been the plaintiffs, would be equally good pleas in bar of this action ; accordingly the defendants pleaded their second, third, fourth, and sixth, pleas, alleging therein respectively matters relied upon as in bar of the right of Robinson, Smedley & Co. to recover ; but not content with those defences they now by their rejoinder put forward a totally different defence, and they allege that the assignment of the policy to Moore was made to him as collateral security to a mortgage to him of the insured property, securing \$500, and that the defendants permitted the policy

to remain in force and to be transferred to Moore by way of additional security to his mortgage, pursuant to the provisions in that behalf of the Act relating to Mutual Fire Insurance Companies in Ontario." Now the provisions of the Act here referred to can be no other than those contained in the 39th section of 36 Vic. ch. 44, which enacts that: "In case any property, real or personal, be alienated by sale, insolvency, or otherwise, the policy shall be void, and shall be surrendered to the directors of the company to be cancelled; Provided, however, that in cases where the assignee is a mortgagee, the directors may permit the policy to remain in force, and to be transferred to him by way of additional security, without requiring any premium note or undertaking from such assignee, or his becoming personally liable for premiums or otherwise, but in such cases the premium note, or liability of the mortgagor in respect thereof, shall continue in no wise affected."

The rejoinder then proceeds to aver that Robinson, Smedley & Co. remained in possession of the equity of redemption in the insured premises subject to Moore's mortgage, until they transferred such equity of redemption to Robinson & McDonald, (a fact which had been averred in the fourth plea as itself a bar to the plaintiff's right to recover in this action), and that thereafter Robinson & McDonald were owners of the equity of redemption, and that they, at a time not stated, but some time before action and after the loss, paid and satisfied Moore's mortgage debt. Now the gist of this defence would seem to be, not that the policy had been wholly avoided by the acts of the original assured parties, and which would have avoided the policy if there had been no assignment, but that, although the 39th sec. of 36 Vic., ch. 44, provides for an assignment being made and allowed by the insurers to a mortgagee, and that notwithstanding the policy shall continue in force as the policy of such original insured, and therefore subject to all the conditions thereof, still that an assignment, made under that section to Moore, enured to the protection of Moore's interest as a mortgagee, notwithstanding the

several defences pleaded in the second, third, fourth, fifth, and sixth pleas, and that it was payment of the mortgage debt by the owners of the mortgaged property which avoided the policy and defeated the plaintiff's right to recover thereunder, and not the several matters which had been pleaded in the above pleas. In short, the matter in the rejoinder was substituted for all the matters alleged by way of defence in the said several pleas.

Now, this rejoinder is demurred to as involving a departure from the above pleas, and that it is open to that objection I think that there can be no doubt, notwithstanding that the payment of Moore's mortgage debt, as therein stated, might be a perfectly good and complete defence in itself to this action, if the policy, after assignment to Moore, could be held to be a policy merely insuring Moore's mortgage debt; but that the rejoinder is a departure from the pleas above enumerated I have no doubt, as indeed will appear by reference to the tenth plea, to which by and bye I shall have to refer, wherein, with very slight variation, the matter alleged in the rejoinder is pleaded as a separate independant plea in bar of the plaintiff's action. The result, therefore, of all the pleadings is, that the defendants, by their rejoinder, abandon all the defences set up in their second, third, fourth, fifth, and sixth pleas, for the purpose of setting up in their rejoinder to a replication to these pleas, a defence which, in substance, they had already put upon the record in their tenth plea. But, although the rejoinder be insufficient in law, am I to give judgment in favour of the plaintiff upon his demurrer, and overlook the insufficiency in substance of his replication to which the rejoinder has been pleaded, although the defendants have notified exceptions to that replication? I think I am bound, notwithstanding, to notice the insufficiency in law of the replication, and to give judgment upon the whole series of pleading to which the rejoinder relates; for if I hold the replication to be bad in substance, although the defendants have not excepted to it, I should look to see whether or not they are sufficient in law; for if the de-

defendants had excepted to the replication, the plaintiff might perhaps have fallen back upon them and excepted to them.

The second plea is, in my opinion, good in substance, for the matter therein alleged, (admitting it to have taken place after the assignment of the policy to Moore, as the same is averred in the declaration), avoided the policy declared upon in the terms of an express condition endorsed upon the policy and set out in the declaration.

So likewise the third plea appears to me to be good in substance, for the matter therein alleged, admitting it to have taken place after the assignment to Moore, as pleaded in the declaration, avoided the policy under and in virtue of the provisions of the 37th section of the Act 36 Vic. ch. 44, being the act referred to in the plea; for that section must, I think, be read as applying to all policies issued by a mutual insurance company, whether the same be issued upon the mutual principle or upon the cash principle, upon which latter, I think, I must regard the policy declared upon to have issued, under the 71st section of the Act, inasmuch as the policy, as declared upon, is stated to have been made in consideration of the sum of \$20 paid to the defendants, and no premium or deposit note is alleged to have been given. So likewise the fourth and fifth pleas appear to me to be good, admitting the matters therein alleged to have taken place after the assignment of the policy to Moore as the same is averred in the declaration, for these matters are based upon an averment that the policy was made subject to a condition in the introductory part of the fourth plea mentioned, although it is not set out in the declaration, and such condition, if the policy be subject thereto, was broken by the matters alleged in the fourth and fifth pleas respectively; indeed, the transfer by Robinson, Smedley & Co. to Robinson & McDonald of the insured property, without the consent of the insurers to the policy remaining in force for the benefit of the purchasers, would avoid the policy from the nature of such an instrument as an indemnity against loss to the party insuring, independently of any express condition endorsed on the policy to that effect. The only one of the pleas as to which I have

any doubt is the sixth plea. That plea is not based upon any express condition averred to have formed part of the policy : it rests upon the provisions contained in the 39th sec. of 36 Vic. ch. 44. The defendants aver that they are a mutual insurance company under that Act, and they allege that after the policy was made the property thereby insured was alienated by a sale or transfer thereof by way of mortgage to certain persons trading under the name of Thompson & Co., whereby the policy became and was void. The doubt which I have had is whether or not the above section of the act referred to should be confined to policies entered into upon the mutual principle.

If the owner of property insured against loss by fire in a proprietary company, or with any underwriters, parts with the whole interest in the insured property to a third person, the policy from the nature of the contract contained in it becomes avoided, unless the assurers consent to the transfer of the property, and of the policy also, to the transferee of the property, for the insured in such case having parted wholly with the property insured could suffer no loss by its destruction. Upon the assent, however, of the insurers to the transfer of the property and of the policy to the purchaser or donee of the property, the policy enures and continues in force for the benefit of the new owner of the property and of the whole interest which had been insured, and this is what the first branch of the proviso of the 39th section of the Act, as it appears to me, does, when it provides in what manner the alienees of property insured in a mutual fire insurance company can, not only in equity, but in law become the insured person, as the new owner in lieu of the original insured owner ; but in a proprietary company, or in the case of individual underwriters, when there is no express condition on the policy avoiding it in case of alienation by way of mortgage only, will a mortgage of the insured property avoid the policy ?

Doubtless it is very material to insurers that they should be able to decline to continue bound by a policy if the property should be mortgaged to persons of whom they might not approve, or to several persons, and to an amount

perhaps in excess of the value of the property ; but in case they exact no condition protecting themselves in any such contingency, would they not, when they they had received full consideration for the policy in cash, be obliged to pay the amount of insurance in case of loss to the insured person, notwithstanding that he may have executed a mortgage upon the insured property ? If they neglect to protect themselves by an appropriate condition I do not see why they should not. If the 39th section of the above Act includes a cash premium policy as well as a mutual policy, then the defendants may avail themselves of the protection of that section, although there be no express condition upon the policy avoiding it in the event of the property being mortgaged, for the section says, that "in case any property," (which must mean any insured property), "real or personal, be alienated by sale, insolvency or otherwise, the policy shall be void, and shall be surrendered to the directors to be cancelled." These words are sufficiently large to comprehend alienation by way of mortgage, and that such was the intention of the Act appears from the proviso, that "in cases where the assignee is a mortgagee, the directors may permit the policy to remain in force, and to be transferred to the mortgagee by way of additional security, without requiring any premium note or undertaking from such assignee to his becoming personally liable for premiums, or otherwise ; but in such cases the premium note or undertaking and liability of the mortgagor in respect thereof, shall continue in no wise affected." This language certainly seems to be more appropriate to a mutual policy (in which case a premium note is given, which is subject to assessment), than to a cash premium policy, in which case the consideration is paid at the time of the execution of the policy ; but the 71st section authorizes previously incorporated companies, which these defendants are, to issue cash premium policies and it enacts that all premium notes given upon the effecting policies upon the mutual principle, shall be applicable to the payment of such cash premium policies, for this

reason and because there seems to be the same reason why a mortgage made of the insured property, without the assent of the insurer to the continuance of the policy, should avoid a cash premium policy as well as one issued upon the mutual principle. I think we must read the language of the Act, which is general, as applicable to all policies entered into by a mutual insurance company, whether issued for a cash premium or upon the mutual principle, and that therefore both are avoided alike by the 39th section, unless the insurers consent to the policy remaining in force for additional security to the mortgage.

It might, perhaps, also be held that the condition upon which the policy declared on was granted, as stated in the declaration, namely, that "If the assured is not the sole and unconditional owner of the property insured," &c., should apply not only to the state of things at the time of the execution of the policy, but thenceforth until and at the time of the loss also, so as to require the consent of the insurers to every alienation, whether of the whole estate or of a mortgage interest.

The sixth plea, however, is predicated solely upon the provisions of the statute relating to mutual insurance companies; and I think that the policy declared upon (although it must, as it seems to me, be regarded as a cash premium policy,) is within the operation of the 39th sec. of 36 Vic. ch. 44, and that therefore, unless displaced, the matter stated in that plea avoids the policy, and the plea therefore is sufficient in law.

The result is, that, although the rejoinder demurred to is insufficient in law, still the replication to which the rejoinder was pleaded is also insufficient in law, and judgment thereupon must be given in favour of the defendants, but they should have no costs upon this judgment, as their rejoinder is bad, and they did not demur or file exceptions to the replication, in so far as it was pleaded to the above second, third, fourth, fifth, and sixth pleas.

There still remains to be considered the demurrer to

the replication to the tenth and eleventh pleas and the exceptions taken to those pleas.

The short material substance of the tenth plea, which is pleaded as a defence upon equitable grounds, is that the defendants are a mutual insurance company, incorporated under and subject to the provisions of the Act 36 Vic., ch. 44, and that the policy in the declaration mentioned was issued subject to the condition as to avoidance, in case of double insurance, set forth in the 37th section of that Act; that the defendants assented to the assignment of the policy to Moore as collateral and additional security to a mortgage executed by the insured in his favour, securing \$500: that afterwards Robinson, Smedley & Co. continued interested in the insured property and in the policy, as owners of the equity of redemption in the insured property, and entitled to the proceeds thereof over and above the amount of Moore's mortgage debt of \$500: that while so interested Robinson, Smedley & Co. transferred and assigned to Robinson and McDonald all their, Robinson, Smedley & Co.'s right, title, and interest, that is, their equity of redemption therein, and in the said policy; and that while Robinson and McDonald were so entitled to the same, and were insured under the policy, subject to Moore's interest in the insured property, they effected another insurance upon the insured property for \$1,000, with the Canadian Mutual Insurance Company, without the consent of the defendants, and that afterwards Robinson and McDonald, being such owners of the estate and interest of Robinson, Smedley & Co. in the insured property, paid and satisfied the mortgage thereon held by Moore before or at the time of the assignment in the declaration mentioned of the policy and right of action by Moore to the plaintiff.

The eleventh plea, which is pleaded to the excess of the policy over and above Moore's mortgage debt, referring to the introductory matter set out in the tenth plea as repeated, rests upon the second insurance effected by Robinson and McDonald as voiding the policy as to any interest they had as assignees of Robinson & Smedley & Co.'s equity of redemption in the insured premises.

Now it is observable that in these pleas the defendants do not expressly allege that the sale of the equity of redemption in the insured property, and of their interest in the policy by Robinson, Smedley & Co. to Robinson & McDonald took place with the assent of the defendant. Upon the principle, however, that every pleading is to be construed most strongly against the party pleading it I must hold, in so far as these pleas are concerned, that such transfer did take place with their assent, for otherwise the sale and transfer by Robert Smedley & Co. of their whole interest in the insured property would have avoided the policy both as to Robert Smedley & Co. and as to Moore, for the assent of the assignment of the policy to Moore did not constitute a new contract with him insuring his mortgage debt; but, whether we regard the 39th sec. of 36 Vic., ch. 44, or independently of that section, constituted only an assent by the defendants to Moore's being beneficially interested to the amount of his mortgage debt in whatever sum Robinson, Smedley & Co, might be entitled to under the policy, and they having assigned all their interest in the insured property before loss would not be damnified at all upon a loss occurring to the property, and so would be entitled to nothing. Moore could get nothing except in the right of the original insured. When, however, the defendants say, as they do in these tenth and eleventh pleas, that after the assignment by Robert Smedley & Co., of their equity of redemption in the insured property, that is, of the insured property subject to Moore's mortgage to Robinson & McDonald, the latter became interested in the policy, were insured thereunder, subject to Moore's mortgage interest, as that could only be in case the defendants had assented to the transfer of the property to Robinson & McDonald, and to the policy continuing as a policy to them as the new owners of the property in place of the original insured owners. I must hold, upon these pleas, as against the defendants, that they assented to the policy remaining a security to Robinson & McDonald, as the insured persons.

under the policy, in the place and stead, of Robinson, Smedley & Co., and to the continuance of Moore's beneficial interest in the moneys recoverable to the same extent as if Robinson, Smedley & Co. had retained their interest in the property. When therefore Robinson & McDonald, after they had become owners of the insured property to the same extent as Robinson, Smedley & Co. had been, and while with the consent of the defendants they were regarded as the owners of the property, whose interest, as owners, was insured by the policy to the same extent as Robinson, Smedley & Co. had been, effected another insurance with the Canadian Mutual without the consent of the defendants, the defendants' policy became avoided; but that is not the defence which these pleas set up, but they treat it as avoiding only the interest of the owners of the property as distinguished from the mortgagee's interest, and they seem to regard the policy as having a duplicate existence, that is to say, as being also an insurance of the mortgagee's mortgage debt, and as to that the tenth plea pleads that before or at the time of the assignment stated in the declaration from Moore to the plaintiff, as trustee of the creditors of Robinson & McDonald, Robinson & McDonald being liable as owners of the insured property to pay Moore's mortgage thereon, did pay and satisfy the same, and that therefore Moore's assignment to the plaintiff could pass nothing. Now assuming, as the defendants seem to have assumed, that Moore, as mortgagee, had a right, independently of the owners of the property, to recover to the amount of his mortgage debt, as if he had insured that debt, which, however, was not his position, payment of such mortgage debt by the owners of the equity of redemption in the mortgaged property, whether such payment was made before or after the loss, would defeat any right of recovery in his interest; because, in case of the defendants paying him, they would be entitled to get from him a transfer of his mortgage, which having been paid and satisfied, could not be effectually transferred to them.

In any view, therefore, the tenth plea, if the matter

therein stated be true, shews a good defence. The eleventh plea is pleaded only to the excess of the policy over and above the amount of Moore's mortgage debt, and to such excess, that is to say, to the interest of Robinson and McDonald in the policy, the plea, unless displaced, is a good plea.

Now, the replication to these pleas, which is the same as that to the other pleas, namely, that the matters therein pleaded occurred after the assignment of the policy to Moore in the declaration mentioned, offers no answer whatever to these tenth and eleventh pleas; indeed, these pleas themselves state the matters therein pleaded as having occurred after such assignment.

In fine, the plaintiff cannot recover in this action unless in right of Robinson, Smedley & Co., or of Robinson & McDonald, or of Moore. He cannot recover in right of Robinson, Smedley & Co., because they had no interest in the insured property at the time of the loss; nor in the right of Robinson & McDonald, because they had no interest in the policy unless they were accepted by the defendants as the insured owners of the property and of the policy, in the place and stead of Robinson, Smedley & Co., and if they were, then the policy became avoided by the second insurance which was effected without the consent of the defendants. Neither can the plaintiff recover in right of Moore, because Moore himself could only recover in right of Robinson & McDonald having been accepted by the defendants as the insured owners in the stead of Robinson, Smedley & Co., in which case the second insurance avoided Moore's interest also; and, assuming Moore to have had an independent interest, as mortgagee, to the extent of his debt, that is to say, if the assignment to him could be treated as an insurance of his mortgage debt, still the plaintiffs cannot recover; for that debt having paid and satisfied by the owners of the equity of redemption in the mortgaged property, the mortgage security cannot be effectually transferred to the defendants.

Judgment must be for the defendants upon the demurrer to the replication to the tenth and eleventh, and upon the exceptions taken to those pleas.

At the conclusion of the argument HAGARTY, C. J., said : We agree with the judgment of Gwynne, J., and therefore affirm the same, without reserving the case for further consideration.

ARMOUR and CAMERON, JJ., concurred.

Per Curiam.—Judgment affirmed.

FREEHOLD LOAN AND SAVINGS COMPANY V. BANK
OF COMMERCE.*Chattel mortgage—Affidavit of bona fides—Insufficiency.*

The affidavit of *bona fides* on a chattel mortgage was made by the manager of a Loan Society, no written authority to him being filed with the mortgage, nor any statement contained in the affidavit as to his knowledge of the circumstances: *Held*, insufficient.

Bank of Toronto v. Macdougall, 15 C. P. 475, distinguished.

INTERPLEADER for goods seized by the sheriff at the suit of the defendants, the same being at the time under chattel mortgage to the plaintiffs, executed by one Brown, the execution debtor, dated the 20th September, 1878.

The affidavit of good faith, &c., required by the Chattel Mortgage Act, was made by "Charles Robertson, of the city of Toronto, manager of the Freehold Loan and Savings Company, the mortgagees," who swore that the mortgagor was justly and truly indebted to the company, &c.

No written authority to him was attached to or registered with the mortgage.

The case was tried at the last Spring Assizes, at St. Catharines, before Paterson, J. A., without a jury.

It was objected that this affidavit was insufficient under the statute, but the learned Judge overruled the objection and entered a verdict for the plaintiffs.

On the 21st of May *J. A. Miller* obtained a rule *nisi* to set aside the verdict and enter it for the defendants, on the ground that the plaintiffs had no power to become mortgagees of goods, and could not take such a mortgage, and also, that the affidavit of *bona fides* was not made by the mortgagees, or other authorized agent, in writing, as required by the Chattel Mortgage Act.

On the 31st of May, 1879, *Bethune*, Q.C., shewed cause. There was no authority to the plaintiffs' manager necessary to be shewn, because that appears on the face of the instrument: *Bank of Toronto v. McDougall*, 15 C. P. 475.

J. A. Miller, contra. The case relied on is not authority for what is contended for here; it would be pushing the doctrine of agency too far—much farther than it has ever gone in cases of the kind.

June 28, 1879. HAGARTY, C. J.—Chapter 119 R. S. O., section 1, directs that the affidavit shall be that of the mortgagee, or of the agent of the mortgagee, if such agent is aware of all the circumstances connected therewith, and is properly authorized in writing to take such mortgage, in in which case a copy of such authority shall be registered therewith.

Nothing is stated in this affidavit as to the deponent's knowledge of the circumstances.

The only decision to which we have been referred is *Bank of Toronto v. McDougall*, 15 C. P. 475. It was held, with some hesitation, that the affidavit of the President of the bank was sufficient to satisfy the Chattel Mortgage Act.

Richards, C. J., considered that the president taking such security "does not act as an agent. He is exercising the corporate powers in the only way in which they can be exercised at all. He acts directly and in chief, and not by delegation. * * The affidavit could be thus "considered as the affidavit of the mortgagee made in the only way the mortgagee could make the affidavit, namely, through its administrative officer."

I do not see how we can extend the doctrine here laid down to the case before us.

The manager of this company appears to us to stand in a very different position from its president. The latter is one of the corporation, the chief partner, and in a sense its organ and representative. The manager is an executive officer, not a corporator—a mere agent, with certain specified executive functions, acting under the authority and direction of the president and board of directors. I think it impossible on any principle of construction to regard him in such a matter as in any other position than that of an agent.

I think the affidavit is insufficient, and that the plaintiffs must fail.

This renders it unnecessary to discuss the other objection, as to the plaintiff's incapacity to take a chattel mortgage.

It may be not unworthy of notice that upon a mortgage for \$9,000 an arrear of interest had accrued of \$765, for which time was agreed to be given on the chattel security. The proviso for redemption is on payment of this last sum, and on payment of all further interest due or to grow due upon the mortgage, and of the principal sum of \$2000, and provided that the mortgage should be reduced to \$7,000. The affidavit swears that the mortgagor is indebted to the company in \$10,269.80, and that the chattel mortgage was executed to secure the payment of the money so justly due or accruing due.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute to enter nonsuit.

HEWITT V. THE ONTARIO COPPER LIGHTNING ROD CO.

Master and servant—Enticing servant to desert employment—Measure of damages.

Plaintiff sued defendants for enticing and procuring certain of his servants to desert his service, and the evidence at the trial established that the parties were in plaintiff's service, and were, with the exception of one of them, induced by the defendants' manager to leave: *Held*, following *Lumley v. Gye*, 28 Q. B. 216. that plaintiff was entitled to recover, and that the measure of damages was not confined to the loss of services, but that the jury were justified in giving ample compensation for all damages resulting from the wrongful act.

Plaintiff, while objecting to one of the parties going, said he did not know that he would trouble him if he did leave: *Held*, that this did not, in law, amount to a permission to leave his service.

THE declaration contained twelve counts: the first, wrongfully enticing and procuring one P. M. Senn, knowing him to be the servant of the plaintiff, in his business as a dealer in, and erector of, lightning rods, unlawfully, and against the will of the plaintiff, to depart from his service, whereby the plaintiff lost the services of the said Senn. The second count was for harbouring the said Senn, after he had left the plaintiff's service unlawfully, as in the first count set out; and the third count alleged that the plaintiff was a dealer in lightning rods, and in erecting and putting up the same on houses, barns, and outbuildings, and had contracted and agreed with one P. M. Senn to work for and serve the plaintiff for one year, from the 1st day of March, in the year of our Lord one thousand eight hundred and seventy-eight; yet the defendants, well knowing the premises, and maliciously intending to injure the plaintiff as such dealer in, and erector of, lightning rods, whilst the said agreement was in force, and before the expiration of the said term, and while the said P. M. Senn was engaged in and about the plaintiff's said business, enticed and procured the said P. M. Senn to refuse to perform such services, by means of which enticement and procurement the said P. M. Senn wrongfully refused to work for the plaintiff, and engaged with the defendants. The fourth, fifth, and sixth were similar counts, with respect to one H. A.

Bauslaugh. The seventh, eighth, and ninth, with respect to one George Campbell; and the tenth, eleventh, and twelfth, with respect to one Richard McQueen.

The defendants pleaded not guilty. 2nd. To the first, second, fourth, fifth, seventh, eighth, tenth, and eleventh counts, that the said P. M. Senn, H. A. Bauslaugh, George Campbell, and Richard McQueen, were not, nor was any of them, the servant of the plaintiff, as alleged. 3rd. To the third, sixth, ninth, and twelfth counts, that the plaintiff had not contracted and agreed with the said P. M. Senn, H. A. Bauslaugh, George Campbell, and Richard McQueen, as alleged.

Issue.

The case was tried at the last Fall Assizes, at Brantford, before Patterson, J. A., and a jury.

The evidence given at the trial established that the said parties were in the employment of the plaintiff, and were, with the exception of McQueen, induced by the defendants, manager to leave that employment.

The jury rendered a verdict for the plaintiff for \$1,100, made up as follows: \$600 with respect to Senn, \$400 with respect to Bauslaugh, and \$100 with respect to Campbell.

On the 19th day of September, 1878, B. B. Osler, Q. C., obtained a rule *nisi* to shew cause why the verdict should not be set aside, and a nonsuit entered, on the grounds, first, that there was no evidence to shew Bauslaugh, Senn, and Campbell, were the servants, menial or otherwise, of the plaintiff, or that they were seduced or harboured by the defendants; secondly, there was no evidence to shew malice in respect of the third and corresponding counts; thirdly, the evidence shewed the men Bauslaugh, Senn, and Campbell, were skilled agents, and not labourers under the Labourers' Act, and therefore no cause of action was disclosed by the evidence under any of the counts; fourth, as to the counts referring to Bauslaugh, the evidence shewed the plaintiff had consented to abandon his rights against Bauslaugh for leaving his service, and having so done he thereby waived his rights, if any, against the defendants;

fifth, the agreement between the plaintiff and Bauslaugh was terminable when the business ceased to pay, and was terminated by Bauslaugh after that contingency arose: or, why the verdict should not be set aside, and a new trial granted on the above grounds; and for misdirection and non-direction on the part of the learned Judge, in this, that the learned Judge ought to have told the jury that there was no evidence of service, or contract of service, between the plaintiff and the men, of a menial nature, or of such a nature that an action would lie for seducing, harbouring, or maliciously procuring them to commit a breach of the several contracts of service; that the learned Judge ought to have told the jury that the Bauslaugh agreement had been terminated by the plaintiff's business in Bauslaugh's hands ceasing to be carried on at a profit; and on the ground of surprise, in this, that the plaintiff swore at the trial that the letters patent of the Globe Lightning Rod Co. were dated in July or August, whereas they were in fact dated on the 31st of May, as shewn by the affidavit filed.

On the 28th of May, 1879, *Hardy*, Q. C., shewed cause. Is there any evidence to support the verdict for enticing the men away?—See *Sykes v. Dixon*, 9 A. & E. 699. On the question of waiving any right against Bauslaugh, see *Lumley v. Gye*, 2 E. & B. 216; *Bird v. Randall*, 3 Burr, 1345, 1354, 1355. As to damages: *Gunther v. Astor*, 4 Moore 12. Whether full damages are recoverable: *Hochster v. De La Tour*, 2 E. & B. 678. On the point of harbouring the men: *Hartley v. Cummings*, 5 C. B. 247.

Osler, Q. C., contra. It must be shewn that the defendants incited the men to leave, and this was not done. *Bird v. Randall* shews that after what occurred at Harrisburg, plaintiff could not follow the servant. *Lumley v. Gye* does not support the second count, because it is shewn these are not within the Labourers' Act, 23 Ed. iii. ch. 1. The only action given for receiving a labourer is by this Act: *Ashley v. Harrison*, Peake 194; *Taylor v. Neri*, 1 Es. 386.

28th June, 1879. CAMERON, J.—We think the defendants' rule should be discharged. The case is not distinguishable, in principle, from *Lumley v. Gye*, 2 E. & B. 216, cited on the argument, in which, on demurrer, a declaration was held good, alleging that the plaintiff was lessee and manager of the Queen's Theatre, for performing operas for gain to him, and that he had contracted and agreed with Johanna Wagner to perform in the theatre for a certain time, with a condition, amongst others, that she should not sing or use her talents elsewhere, during the term, without plaintiff's consent in writing; yet defendant, knowing the premises, and maliciously intending to injure the plaintiff, as lessee and manager, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform; by means of which enticement and procurement of defendant, Wagner wrongfully refused to perform, and did not perform, during the term. The law was very fully considered, and although Mr. Justice Coleridge, in a very elaborate judgment, dissented from the majority of the Court, the decision arrived at has never been reversed, or the principle laid down questioned by later decisions. The grounds for nonsuit and of objection to the learned Judge's charge on this head, must therefore fail.

On the merits, there was abundant evidence to go to the jury, that defendants, by their manager, had enticed and procured the men, Bauslaugh, Senn, and Campbell, to leave the plaintiff's employment, and we cannot say that the jury arrived at a wrong conclusion; nor, assuming that a verdict for the plaintiff was warranted, that the damages awarded are excessive. The error committed by plaintiff, in misstating the date of the letters patent, is unimportant, and furnishes no ground for a new trial, as the plaintiff would not be restricted in his right to recover damages to the time when the Globe Lightning Rod Co. was formed. The measure of damages is not confined to the loss of the services of the servant enticed away. The jury are justified in giving ample compensation for all the damages resulting

from the wrongful act: *Gunther v. Astor*, 4 Moore 12, and the judgment of Crompton, J., in *Lumley v. Gye*. The plaintiff did not, upon the evidence, consent to Bauslaugh's leaving his service, but, while he objected to his going, said he did not know that he would trouble him if he did leave. This could not be taken, as matter of law, to be a permission to Bauslaugh to quit the plaintiff's employment, and the learned Judge could not properly have so told the jury. There is no valid ground upon which the Court can interfere with the verdict the plaintiff has obtained, and it must therefore stand.

HAGARTY, C. J., and ARMOUR, J., concurred.

Rule discharged.

MCDONALD V. MCDONALD ET AL.

Deed—Delivery—Purchase for value without notice—Registry laws.

One M. prepared a deed of the land in question, which purported to be executed in plaintiff's favour and delivered by him, and requested one C. to witness his execution of it, which C. did. He then procured C. to swear to the affidavit of execution in the usual form for registry. Subsequently in a moment of anger against plaintiff, he tore up the deed, the pieces of which plaintiff collected and stitched together: *Held*, that the deed was executed and delivered, so as to vest the land in plaintiff.

After tearing up the deed, M. willed one-half of the land to his nephew, and the remaining half to others, and the nephew conveyed the whole lot to a purchaser for value without notice of the plaintiff's deed, both will and deed to this purchaser, being registered before the plaintiff's death: *Held*, that the registration of the will and of the deed prevailed over plaintiff's unregistered deed, as to the moiety conveyed by the nephew; but as to the other moiety devised, plaintiff was entitled to hold this part under the deed from M. as against the devisees under will.

EJECTMENT for lot 6 in the 5th concession of the township of Sullivan.

The plaintiff claimed title by deed from one Alexander McDonald, dated 24th April, 1876.

The defendants appeared and defended for the whole lot, the defendant Crawford claiming an undivided moiety by deed from Alexander McDonald, who was devisee of the plaintiff's grantor, of an undivided half share.

A defence, on equitable grounds, stated that Alexander McDonald (plaintiff's grantor) duly devised to his nephew, the defendant McDonald, one half of all his estate, and the residue to Hugh, Mary, and Archibald McCallum, and directed that his mother should occupy the dwelling house on the lot for life, with an annuity of \$75 charged thereon: that the will containing these devises was duly registered: that the defendant and devisee Alexander McDonald, by deed, dated 10th February, 1879, conveyed to the defendant Crawford his undivided share for value, which was duly registered, but that the alleged deed from the deceased to the plaintiff was not registered till after defendant's deed; and that the defendant was a purchaser for value without notice; and he claimed that the plaintiff's deed should be declared void and the registration vacated as a cloud on defendant's title to the undivided half.

There was no formal limiting of the defence.

The defendant Alexander McDonald asserted title in himself, as tenant to Crawford.

The trial took place at Owen Sound, before Osler, J., without a jury.

It appeared that the plaintiff was a sister of Alexander McDonald, the owner of the land, and lived with him and her parents: that he was about going away from Canada, and prepared a deed dated 24th April, 1876, by which he conveyed the whole lot in fee simple to the plaintiff. He seemed to have been a good penman. Alexander Campbell was the subscribing witness, and proved the execution. It was executed in Campbell's house. The plaintiff was not present; but one Vandusen was also present, and proved the execution in duplicate.

On the back of the deed was endorsed an affidavit by Campbell, the witness to the execution, taken before Vandusen, who swore that the grantor had sent for him to

come and take the affidavit. He said he did not intend to register it then; that he was going on a journey and did not know what might happen, and if he lived to come back he could do as he liked.

The plaintiff swore that deceased handed her the deed and said, "The place is yours": that she put it in the bureau: that it was afterwards in a drawer: that deceased went away after seeding time and returned in October: that he had also told her he was going to will the land to her.

It further appeared that in June, 1877, the plaintiff asked the deceased for some money that he owed her, which appeared to vex him.

John Ferguson proved the asking for and payment of the money: that deceased left the room and came back with the deed and shewed it to Ferguson, and he saw it was in the plaintiff's favour: that deceased then tore it up, threw it on the floor, and said, "These is for her": that he thought she had left the room when he did this.

The plaintiff said that she did not know of this tearing up of the deed: that some time after and before his death she found the torn deed, part in the bedroom and part on the table where he had been writing: that she stitched the pieces together. It was perfectly complete and legible. The plaintiff found some of the pieces the same day, the rest the day after. She saw deceased go for the deed and bring it, saying he wanted to shew it to Ferguson, but did not see it torn up.

On the 17th March, 1877, deceased executed a mortgage on the land to Mrs. Williams for \$1,000, with full covenants.

On the 10th September, 1877, the deceased made his will to the effect stated in the equitable defence. He died on the 5th April, 1878, and probate was granted on the 2nd May, 1878.

The nephew and devisee, Alexander McDonald, conveyed the whole lot to Crawford by deed dated 10th February, 1879. He swore that he knew nothing of the deed to the plaintiff. The will had been read in his and the plaintiff's

presence, and she said nothing of her claim to the land. She afterwards made a large claim for wages.

The consideration mentioned in the deed was \$650, the land being valued at from \$4,000 to \$6,000.

A written agreement was made the same day as the deed, by which the grantor was to get in the claim of the McCallums, who were in Scotland, and Crawford agreed to pay \$1,000 more on getting a good deed from the McCallums, the devisees.

The deed was for the entire lot, as if the grantor owned the whole.

The chief contention at the trial was, that the deed to the plaintiff had never been delivered and was inoperative.

The learned Judge entered a verdict for the defendants. He considered that the prior registration of the will and conveyance from the devisee would defeat plaintiff's claim.

He inclined to hold that it was not proved that the deed to plaintiff had been delivered, and so found, decreeing according to the equitable prayer of the petitioner, but referred the whole matter to the Court.

May 23rd, 1879, *H. J. Scott*, obtained a rule *nisi* to enter a verdict for plaintiff, or for a new trial on the law and evidence, and on affidavits of discovery of new evidence, The affidavit was by one Dunn, that some time in the fall of 1876 the deceased told him he had executed a deed of this land in favour of the plaintiff.

Ferguson shewed cause. The deed to plaintiff was not registered, and was therefore cut out by the prior registration of the will and the deed of the nephew to Crawford, a purchaser for value without notice.

Then, as to the delivery of the deed to plaintiff, the fact of its having always remained in the grantor's possession was some evidence to rebut the presumption of its delivery arising from its execution in the presence of a witness, and from the fact of the witness having sworn to its execution. He referred to *Lage v. Mackenson*, 40 U. C. R. 388.

Scott, contra. There was no proof of the registration of

the will, though it may be assumed it was registered. Then the question is, what were the rights of the parties under the Registry Acts? Clearly to have their title protected, if a good title, which is the only protected by these Acts. Then was the defendants' title such? It is submitted it was not. *Scott v. McLeod*, 14 U. C. R. 574.

Then as to the delivery of the deed. The evidence as to this put it beyond doubt. The tearing up of the deed amounted to nothing: *Young v. Hubbs*, 15 U. C. R. 250.

June 28, 1879. HAGARTY, C. J.—If this had been a jury case we think a new trial would be necessary; but it appears to us we can dispose of the case on the evidence at the trial.

We think there is reasonably clear proof of the delivery of the deed, such a delivery as was required to make it an operative conveyance. It seems clear that deceased prepared the deed and asked Campbell to witness its execution, which he did. The deed professes to be executed and delivered by the grantor, who then sends for Vandusen and procures Campbell to swear to the affidavit of execution, in the usual form, for registry. The affidavit swears to the due execution, in the ordinary form.

This all by itself seems to us to be ordinary proof of delivery sufficient in the eye of the law. The very fact of the subsequent tearing, under the circumstances proved by Ferguson, and deceased's expressions under feelings of anger, shew that he fancied that he was thereby undoing, as far as he could, the previous act of conveying the land to plaintiff. All this is apart from plaintiff's own evidence.

We think that deceased executed and delivered (in legal phrase) this conveyance, which vested the land in the plaintiff, and that, unless so far as affected by the registry laws, her claim is valid.

It does not seem to have been suggested at the trial that only a moiety of the land was really conveyed by the devisee to defendant. The conveyance professes to give

the whole, but the grantee had express knowledge that the other moiety had been devised to the McCallums. The registration of the will and the registration of a conveyance by the devisee to a purchaser for value and without notice must, we think, prevail over the prior unregistered deed to plaintiff. But her deed has since been recorded, and no conveyance yet appears to have been executed or registered of the moiety devised to the McCallums. To defeat plaintiff as to this moiety it would be necessary to hold that the mere registration of the will must *per se* give the devisee a title prevailing over the prior conveyance.

We do not see, therefore, how under the registry laws she has lost her claim to an equal moiety of the land. The devisee McDonald had only a moiety to convey to defendant Crawford. The latter is protected to the extent of the interest which McDonald had under the will.

We think the verdict must be entered for plaintiff for one moiety of the land in dispute.

No question need arise as to actual ouster, as her whole title was denied and the defence was not limited in the usual way.

ARMOUR and CAMERON, JJ., concurred.

Rule accordingly.

BURNHAM V. HALL, SHERIFF.

Sheriff—Action for not arresting under attachment for disobedience—Tender by sheriff under attachment.

Held, that an action lies against a sheriff for not arresting an attorney against whom an attachment has issued for not handing over, pursuant to order, all deeds, books, papers, &c., in his custody belonging to plaintiff; and that a plea which stated that on delivery of the attachment to defendant, the attorney delivered to him all deeds, &c., in his custody or power, to be by defendant delivered to plaintiff, in pursuance of the order for contempt of which the attachment issued, and that long before the return day defendant tendered them to plaintiff's attorney, who refused to accept them, and that defendant was at all times ready to deliver them to plaintiff, was bad; for that, besides being hardly an answer to one of the counts of the declaration, which was for falsely returning that the attorney could not be found, a statement that the attorney delivered to defendant all deeds, &c., in his custody, might be true as to those then in his hands, and yet not all within the scope of the order and attachment; but that plaintiff was entitled to have the body in Court, and to get discovery of all deeds, &c.

The first count of the declaration set out certain proceedings taken by the plaintiff against one F. E. Burnham, an attorney, employed by the plaintiff in investing moneys, &c., resulting in the issue of a writ of attachment directing defendant to attach the attorney, and to have him on the first day of Term, &c., to answer to Her Majesty for certain trespasses and contempts, with a memorandum endorsed, that the contempt was in not having handed over to the plaintiff all deeds, books, papers, and writings, in his custody or power belonging to the plaintiff, pursuant to an order, &c.: breach, not arresting, whereby plaintiff was delayed, &c., in the recovery of said deeds, &c., &c., and of said sum of money.

The second count set out the same proceedings and attachment, and arrest of said F. E. Burnham: breach, a voluntary escape from defendant's custody, whereby plaintiff was prevented from procuring him to be examined on an order made for that purpose, on an application by him to be discharged from custody on said writ, and plaintiff lost the benefit which he would have derived from such examination, and was delayed in the recovery of said deeds, &c., and of divers large sums of money.

The third count set out the same proceedings, the attachment and arrest by defendant: breach, falsely returning that F. E. Burnham was not found in his bailiwick, setting out plaintiff's delay in recovering the deeds and moneys, &c.

Defendant demurred to each count, on the ground that plaintiff could not maintain an action for an escape against the sheriff on such a process, his liability being to the Court and not to the plaintiff.

Defendant also pleaded that on delivery of the attachment to him, the said F. E. Burnham delivered to him all deeds, books, papers, and writings in his custody or power, belonging to the plaintiff, to be by defendant delivered to plaintiff, in pursuance of the order for contempt of which the attachment issued, and long before the return day defendant tendered them to plaintiff's attorney then fully empowered to act for plaintiff, yet he refused to accept them, and defendant was at all times ready to deliver them to plaintiff.

Plaintiff demurred to this plea as insufficient, and also replied that the said deeds and papers represented only a small part of the moneys entrusted by him to F. E. Burnham for investment.

This replication was also demurred to.

May 28th, 1879. *H. Cameron*, Q. C., for the plaintiff, cited *Huntley v. Smith*, 4 U. C. R. 181; *Lane v. Kingsmill*, 6 U. C. R. 579; *Savage v. Jarvis*, 8 U. C. R. 331; *Kerr v. McEwan*, 12 C. P., 241.

C. Robinson, Q. C., contra. Attachment for contempt in not paying over money is in the nature of an execution, while attachment for not handing over papers is different.

There is nothing in the declaration shewing that the attorney had any papers which he could hand over. The action will not lie, but if it will there is a good answer in the plea. He referred to *Arch. Pr.*, 12th ed. 1720, 1721; *Atkinson on Sheriffs*, 6th ed., 317, 322, 263; *Clifton v. Hooper*, 6 Q. B. 468.

June 28, 1879. HAGARTY, C. J.—The main question is, whether the action lies at plaintiff's suit.

It was conceded in argument that the action lay if the attachment was for non-payment of money, and it was attempted to distinguish such an attachment from one, as in this case, for disobedience.

It is not easy to understand why such a distinction should exist.

In substance the proceedings taken by plaintiff against his attorney are for the recovery of moneys, or the deeds and securities representing plaintiff's moneys.

There are several cases where the action was brought for escape on an attachment for not performing an award. They were generally where money was awarded to be paid.

Huntley v. Smith, 4 U. C. 181, was of that nature. The objection was there taken.

Sir J. B. Robinson, at p. 183, says, "The attachment is in the nature of a civil remedy, the very object and sole object of which indeed is to enforce the payment of the money awarded." He refers to *Brazier v. Jones*, 8 B. & C. 124. He adds, "That the Sheriff should be liable when a private injury has been sustained from the escape is but reasonable; and in *Higginson v. Sheriff*, *Comyn's Rep.* 155, the principle is stated in broad terms, which, with some exceptions, is undoubtedly correct, that when an officer may justify the detainer he is answerable for the escape of a prisoner."

Lane v. Kingsmill, 6 U. C. R. 579, was for escape on attachment for not paying money. It went off on demurrer.

Savage v. Jarvis, 8 U. C. R. 331, was for a like cause. It does not touch our point.

Com. Dig., Escape, C. "The action lies for an escape, though the prisoner was arrested on a *latitat*, or committed by commissioners' bankrupts for not answering to interrogatories," citing *Moore*, 834, 1 Roll. 47. The case is *Barnes v. Carey*, "Viscount de Bristol," for an escape. Plaintiff

declared that he and other creditors petitioned the Lord Chancellor to grant a commission and name commissioners to examine J. D., their debtor, which was done; that the commissioners offered interrogations to him which he refused, and for that they committed him to prison, and the defendant suffered him to escape. Objections were taken to the declaration, one being that it did not appear that plaintiff was not satisfied. This the Court thought would be intended. Judgment was given for plaintiff. It does not appear that it was questioned but that the action would lie.

The case appears in *Moore*, 834, as the case of the "Viscounts de Bristolle." The report is shorter. It says it was held the action well lay. There is a still fuller report in II. Buls. 236. The point was expressly taken, that it did not appear that he was committed for the debt, "but only for his not conforming of himself."

Coke, C. J., answers that "the loss of the plaintiff grows by reason of the escape which entitles him to his action." The whole Court agreed that "the plaintiff for this escape had just cause of action, being damnified thereby."

This case is cited in argument, *Lewis v. Moreland*, 2 B. & Ald. 59. *Bacon's Ab.*, Escape, F.:—"If a prisoner in custody upon a *capias utlagatum* is suffered to escape, the plaintiff may either maintain an action *qui tam* against the sheriff, or bring an action of debt against him in his own right." "So an action on the case will lie for escape of one taken upon a writ *de excommunicato capiendo*," citing *Stipper v. Mason*, Lutw. 123. This was an action against the sheriff of Norfolk for allowing one Dade to escape after arrest on writ *excommunicato capiendo*, issued at plaintiff's instance from the ecclesiastical court, Dade having been in contempt for not paying money, &c. It was objected that the King should join in the action as in an action on the case for outlawry. The Court held action lay, otherwise the plaintiff would be without remedy, &c. Also objected that the King could pardon the contempt, &c. It was considered that action vested immediately in plaintiff on the escape, and that would not be discharged by pardon.

Dalton on Sheriff, 567 : " If a man be taken on a *capias utlagatum* after judgment, he is in execution for the party, and if he escape, although that he was taken at the King's suit, yet the party hath such an interest in his body that he shall have an escape against the sheriff."

In *Phelps v. Barrett*, 4 Price 26, the Statute 23 Henry VI., ch. 9, is cited, by which sheriffs are allowed to accept bail under any writ, bill, warrant, &c., but excepting persons in execution, *capias utlagatum*, or *excommunicato*.

Garnon's Case, 5 Coke Rep. 88a, sheriff held liable for escape on *capias utlagatum* at the King's suit: "As the King by the original suit of the party, is entitled to have all his goods and chattels, and the profits of his lands by the outlawry, and his body, also in prison, it is reasonable that if he be taken at the King's suit, that as the King shall have benefit by the suit of the party, so the party shall have some benefit by the suit of the King."

Cooke qui tam v. Champneys, 2 Str. 901. Action for escape of Sarah Chatford, taken upon an outlawry on mesne process. Objection, that action would not lie; for the plaintiff was at the end of his suit, and the King only has an interest for the forfeiture, and the body is kept for the contempt. *Per curiam*, "He may never be taken again, and the confinement would have enforced his appearing to the action to reverse the outlawry, for the plaintiff has an interest and a damage, and must have judgment."

I am satisfied that the action lies.

All attachments, whether for payment of money or for express contempt, are in the same form.

I cannot discern any sensible distinction between the plaintiff's interest in the money and in obtaining from his debtor a valuable deed &c., or to compel the execution of a conveyance, &c.

According to the case cited of *Harkin v. Rabidon*, 1 Chy. Ch. Rep., 133, before Esten, V. C., and the authorities there cited, the Court of Equity has a very prompt and efficacious method of dealing with a sheriff guilty of an escape. It seems the quantum of plaintiff's damages can be referred to the Master, and the sheriff held answerable therefor.

We hold the declaration good.

As to the plea we think it bad. It is pleaded to the three counts. It can hardly in any event justify the false return charged. Besides, a statement that F. E. B. delivered to the sheriff all deeds, papers, &c., in the custody or possession of F. E. B. may be true as to deeds, &c., then in his hands, and yet not all within the scope of the order and attachment.

The plaintiff was entitled to have his body in Court and to get discovery of all deeds, &c.

I cannot see the sheriff's right to take upon himself to judge whether these were all the deeds, &c., &c. He does not even bring them into Court.

ARMOUR and CAMERON, JJ., concurred.

Judgment for plaintiff on demurrer.

BARNES V. BELLAMY.

Landlord and tenant—Eviction by title paramount.

Prior to the lease of the premises, for the rent of which this action was brought, the plaintiff's predecessor in title had mortgaged the same, and the assignee of the mortgage brought ejectment against defendant, the tenant of the premises, who thereupon gave up possession: *Held*, that this amounted to an eviction, and that plaintiff could only recover the rent up to the date of the writ, which must be looked upon as the date of the eviction.

Action for breach of covenants to pay rent, and not to cut down timber, contained in a lease of certain land made by the defendant, and for waste, and on the common counts.

The defendant pleaded, among other pleas not necessary to be referred to, a plea of eviction to the count on the covenant to pay rent, upon which issue was joined.

The cause was tried before Burton, J. A., and a jury, at the last Fall Assizes at Hamilton.

It appeared on the trial that the lease in question was dated the 21st December, 1875, to hold for five years from the 1st day of January, 1876, at the yearly rent of \$180, payable yearly: that prior to the making of the lease the plaintiff's predecessor in title, her husband, William Barnes, had made two several mortgages of the demised land to one Romanes: that Romanes, some time in January, 1877, served the defendant with notice not to pay the rent to the plaintiff, but to him, as mortgagee: that the defendant offered the rent then due to the solicitor of Romanes, who refused for some reason to take it. Afterwards, in August, 1877, the defendant was served with a writ of summons in ejectment to recover possession of the demised land, tested 20th of August, 1877, at the suit of one Laidlaw, claiming title by virtue of the said mortgages, and of an assignment thereof by Romanes to him. He then went to a lawyer, who told him he must leave the land. He remained in possession till the 29th of September, 1877, on which day the land was sold by Laidlaw under the powers of sale contained in the said mortgages, who

conveyed to one Osler, who entered into possession, and leased the said land.

A verdict was found for the plaintiff, with \$350 damages, and leave was reserved to the defendant to move to reduce the verdict by the second year's rent, with interest, in the event of the Court being of opinion that there was proper evidence of an eviction by title paramount.

In Michaelmas Term last, *Robertson*, Q. C., obtained a rule *nisi* to reduce the verdict, or in case the evidence of the title paramount, and of the eviction thereunder, was insufficient, to supply further evidence under R. S. O., ch. 49, sec. 8, as amended by 41 Vic. ch. 8, sec. 8a, filing affidavits in support of the latter branch of his rule.

May 27, 1879. *Osler*, Q. C., shewed cause, and admitted that the facts were as above stated, but contended that these facts did not shew an eviction.

F. B. Robertson supported the rule, citing *Spencer v. Marriott*, 1 B. & C. 459; *Hayward v. Parke*, 16 C. B. 295; *Oldershaw v. Holt*, 12 A. & E. 590; *Shuttleworth v. Shaw*, 6 U. C. R. 539.

June 28, 1879. ARMOUR, J.—It is quite clear that what happened amounted to an eviction.

It is said by Pollock, C. B., in *Mayor of Pool v. Whitt*, 15 M. & W. 571: "Now, if a party having a good right to eject the occupier of demised premises, goes there and demands to exercise that right, and the tenant says, 'I will change the title under which I now hold, and will consent to hold under you,' that according to good sense is capable of being well pleaded as an expulsion."

In this case the person having the right to eject the occupier, brings his action to eject him, and the occupier, having no defence to the action, yields and gives up the possession—a much stronger case of eviction than that referred to.

The amount of the verdict must therefore be reduced, but not by the second year's rent, as would have been the

case prior to the passing of the Act 37 Vic. ch. 10, O., since which rent is to be considered as accruing from day to day, and to be apportionable in respect of time accordingly, but by the amount of the rent which would have accrued after the date of the summons in ejectment, August 20th, 1877, which must be looked upon as the date of the eviction.

This amount I make, with interest, to be \$69.57.

The rule will therefore be absolute to reduce the verdict by the sum of \$69.57.

HAGARTY, C. J., and CAMERON, J., concurred.

Rule absolute.

CORPORATION OF CHATHAM V. CORPORATION OF SOMBRA.

Drainage—R. S. O, ch. 174, ss. 535, 539, 540.

Where an award has been made as to drainage work under R. S. O. ch. 174, secs. 535, 539, 540, the township to be benefited must pass a by-law under sec. 539 to raise the sum awarded against them, and cannot refuse payment until the work is completed.

There is no remedy expressly provided by the Act for the case of improperly or insufficiently executed drainage work. If not executed at all, the money may be recovered as on a failure of consideration.

THE declaration was for money to be paid by the defendants to the plaintiffs according to the award of Robert Fleck, Augustine McDonell, and Thomas R. K. Scott, made under submission to arbitration by plaintiffs and defendants of matters in difference between them. There were also the common counts.

Plea: Never indebted.

Issue.

The trial took place at the last Fall Assizes at St. Thomas, before Galt, J., without a jury.

It appeared that the plaintiffs' township desired to effect some works under the drainage clauses of the Municipal

Act, and that parts of the defendants' township would be benefited thereby. A report was made by the engineer under sec. 535, and a sum was assessed against certain lands and roads of the defendants by reason of the benefit to them arising from the work in question, all of which was to be executed within the plaintiffs' township.

The defendants appealed against this amount under sec. 540, and an arbitration was duly arranged in accordance with the Act, and the above named parties were appointed referees.

By award, dated 30th September, 1875, and signed by all three, they awarded "that the township of Sombra, for benefit of roads and lands by the deepening of the Otter Creek, as recommended by I. W. Shakleton in his report to the Council of Chatham, shall pay to the said township of Chatham the sum of \$700 instead of the sums named in the report of the said I. W. Shakleton, which said sum of \$700 the said township of Sombra shall apportion in the same ratio for benefit to roads and lands as is set forth in the report of the said I. W. Shakleton, or in such other manner as shall be lawful, and shall pay the said sum of \$700 to the said corporation of the said township of Chatham."

The work was proceeded with and finished two or three years ago.

In August, 1877, the defendants were applied to, but did not pay.

At the trial the defendants called witnesses to impeach the character of the work, and to prove that the cutting was not deep or wide enough, and not up to the stipulations of the specifications: that it was not of much benefit to Sombra, and that it could be made a great deal better.

For the plaintiffs the engineer gave evidence in favour of the work, and that it was done substantially according to the contracts and specifications, and that it was impossible, by such recent examinations and measurements as defendants' witnesses proved, to ascertain how the work was completed several years ago.

The learned Judge entered a verdict for the plaintiff for the amount of the award with interest from four months after the demand. He said he directed this because he accepted the evidence of Mr. Shakleton, who was the commissioner.

May 22nd, 1879. *Bethune*, Q. C., obtained a rule *nisi* to enter a verdict for the defendants, on the ground that the plaintiffs had not performed the work, for the doing of which the action was brought.

June 2nd, 1879. *McMichael*, Q. C., shewed cause. Before even a spade was put into the ground the plaintiffs could have compelled the defendants to pay their share. If defendants admit the completion of the work they have a right to say that they are only bound to pay their share of what it cost. If the work was not completed defendants had a right to pay the money and compel its expenditure in the completion of the work.

Falconbridge, contra. The Court will require very positive language before holding that defendants must pay any portion of the amount awarded before the work is done. The fact is, that the work was so badly executed as to be of no use or benefit to the defendants. Defendants were not bound to contribute their proportion before the work was begun, as contended: they were entitled to wait until the work was completed, and were then only bound to pay their proportion in case it was properly executed.

The statutes referred to were R. S. O. ch. 174, secs. 535, 539, 540.

June 28th, 1879. HAGARTY, C. J.—If we accept the learned Judge's finding, which we regard as in favour of plaintiffs on the merits, the objection is at an end. On reference to him we find he is quite satisfied as to the merits.

On this point alone the defendants must fail, unless we take a different view of the merits. But a perusal and

consideration of the evidence induce us to think that we cannot safely interfere with the finding.

It was also urged for plaintiffs that the doing of the work, or the doing it in any particular manner, was not a condition precedent to their right to receive the money.

Section 538 declares that the report, plans and specifications of the engineers shall be served on the defendants, and unless appealed from shall be binding on them.

Section 539 directs the defendants, within four months from the delivery to them of the report, to pass a by-law to raise such sum as is named in the report, or, in the case of appeal, such sum as may be determined by the arbitrators in the same manner as provided in sec. 529.

Now, in this case it does not appear that the defendants took any steps whatever after the award was made. The work was proceeded with and finished a couple of years before the action was brought.

The award made in 1875 directs the \$700 to be paid by the defendants to plaintiffs. It was their duty to raise the money within the time limited by sec. 539.

It does not appear to us that they are entitled to refuse payment until the work is done.

The work may require a long time—possibly extending over two seasons—for execution, and the funds may be required for carrying it on.

Sec. 535 declares that the amount charged for roads, or settled by arbitration, shall be paid out of the general funds of the municipality.

This award is partly for the benefiting of lands and partly for roads.

The Act does not expressly provide a remedy for the case urged by defendants, viz., that the works have been improperly or insufficiently carried out. If not executed at all, we presume the money paid could be recovered back as on a total failure of consideration.

In this case the validity of the award was undisputed. It contains an absolute award of payment of a named sum. The statute directs that sum to be raised in a named

time. We are not concerned with the question whether the defendants raised the money as directed, and then refused to pay it over, or whether they have done nothing whatever in the premises beyond standing by and allowing the plaintiffs, without objection or remonstrance, to carry out the improvements on Otter Creek, which were undertaken clearly on faith of this contribution from defendants township.

It seems to us that in the case before us the verdict must stand.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

MOORE V. KUNTZ.

Action for goods bargained and sold—Period of credit not expired.

An action for goods bargained and sold, to be paid for by instalments, cannot be maintained until the full period of credit has expired.

DECLARATION for money payable by defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant, and on accounts stated between them.

Plea: Never indebted.

Issue.

The case was tried at the last Spring Assizes, at Berlin, before Burton, J. A.

The plaintiff being called as a witness, said: "I have had dealings with the plaintiff for the last thirteen or fourteen years. I had an arrangement last year with him about hops. On the 4th of November last year he came to me on the street and said he was out of hops, and that he wanted some right away. He asked what I would take for twenty bales like those I had given him. This was on the same condition he had got them the year previous. I said I would take thirteen cents a pound. He offered me twelve and a half cents. He said he would take the

twenty bales like those he had received. I said it was half a cent less than I wanted, and I told him I would consider and let him know. There was a definite offer by him for twenty bales, and the method of delivery was to be that of the previous season. I told him if I did not call I would not be going to accept his offer. I called in the brewery on my way home to dinner. * * He said, 'Well, are you going to accept my offer?' I said, 'Yes, I have concluded to accept it.' * * At this time there had been one bale delivered. That bale was included in the sale. He referred to that bale in his offer. He sent for that bale while we were working in the hop house. There was no bargain made for that bale. In the year previous the hops were weighed out and put aside for defendant, who called for them as he wanted them. * * On the 5th November the defendant sent his son for two bales. He got the two bales. When the boy came there was no talk of price. This was the day after the bargain. There was nothing more done or said until the 25th of January, and then the defendant sent his son for a bale. He said he wanted another bale of those hops. He got it. Nothing was said about price. The remainder of the twenty bales were put aside. They were baled. The standard is 200 pounds per bale. The defendant mentioned both twenty bales and two tons. The price was to be twelve and a half cents, at three and six months from the date of sale. He has not sent for the rest of the hops. I went in one day to see him. He asked me if I had made out my account for the four bales. I said I had no account to make for four bales. He said he had not bought the quantity I said. I understood that he refused to carry out his contract."

In cross-examination he said: * * "The conditions of the transactions were for three and six months. Nothing was said about when the notes were to be given. There was no writing. He was to get the hops whenever he required them. He sent the boy on the fifth for two bales. He got another bale on the 23rd of January. Up to the

23rd of January I had not weighed those bales, but they had been put aside. I swear they had been put aside. I told the defendant I had the bales set aside for him. He knew I had set these aside for him some time in February or March. I am not exactly sure."

John Rock, witness for plaintiff, said : * * "I worked for plaintiff in the season of 1875. * * Late in the fall I had some business with defendant. I went into the brewery. Lewis (defendant's son) asked me if the hops were all pressed. I said no ; but if you need some there are some pressed. He said, we don't need any yet ; but we bought two tons of hops from Moore, and I wished to go down and pick them out and set them aside. We only press in the hot weather to supply customers."

The learned Judge entered a verdict for the plaintiff for \$250, with interest from the 23rd of February, 1879.

May 22, 1879. *C. A. Durand*, obtained a rule *nisi* to set aside the verdict for the plaintiff and to enter it for defendant, on the ground that there was no binding contract in law, the price of the goods having exceeded \$40, and there not having been any writing signed by the party charged thereby, nor any part delivery or part payment at the time of the making of the alleged contract, so as to take the same out of the Statute of Frauds ; or why the verdict should not be set aside and a new trial had without costs, or with costs to abide the event, on the ground of discovery of new evidence after the trial, as shewn by the affidavits filed ; and on the ground that the verdict was against evidence and the weight of evidence.

June 4, 1879. *Osler*, Q. C., shewed cause, contending that the evidence shewed a sufficient delivery of part of the goods, either by the sample bale of hops delivered before the bargain or by the two bales delivered on the 5th November, 1878, after the making of the bargain, and that the action would lie on the count for goods bargained and sold on credit, though payable by instalments, and

although only one instalment had become due; but he objected that the last point had not been raised at the trial and should not be entertained now, and the affidavit did not make out a case of surprise. He cited the following cases: *Morton v. Tibbett*, 15 Q. B. 428; *McMaster v. Gordon*, 20 C. P. 16; *McNeal v. Keleher*, 15 C. P. 470; *Robinson v. Gordon*, 23 U. C. R. 143.

Durand, contra, contended that the delivery of the bale before the bargain could not in any sense be treated as a delivery to or acceptance by the defendant to take the case out of the Statute of Frauds, and that a delivery and acceptance of part of the goods purchased the day following the alleged bargain, was not sufficient in the face of the defendant's statement that the two bales had not been bought as part of a larger quantity, but in the ordinary course of business: that at all events the common count for goods bargained and sold could not be maintained on the facts proved: that no specific twenty bales at the time of the bargain had been set apart for the defendant, nor was there any appropriation of them by the plaintiff recognized by the defendant before suit, nor could the plaintiff recover for the four bales received by defendant on the count for goods bargained and sold, nor on the account stated. He cited *Robertson v. Strickland*, 28 U. C. R. 221.

JUNE 28, 1879. CAMERON, J.—Upon this evidence it is clear the action cannot be sustained in its present shape, as there is an express contract shewn to pay at three and six months, and not an implied one to pay for the hops on request. In *Paul v. Dod and Holmes*, 2 C. B. 800, Tindal, C. J., said, "No part of the goods can be singled out for payment by cash. The contract was to pay for the entire goods £30 in cash and the residue by instalments of £30 at each succeeding three months, to be secured by bills. The plaintiff should have declared upon the special contract under which the defendants would have been clearly liable. He cannot however maintain an action upon an

implied contract until the expiration of the period at which the entire debt would have become due." The facts in reference to which this language was used were as follow: The defendant Dod applied to the plaintiff, an upholsterer, to complete the decoration and furnishing of a house in his occupation. The plaintiff declined to do so without security, whereupon the defendant Holmes was offered and accepted as Dod's surety. The estimated value of the goods to be supplied at first was between £80 and £100, subsequently increased to £244, which it was agreed should be paid, £30 in cash and the residue by bills of £30, each succeeding three months. By direction of Holmes the goods were invoiced to Dod and himself jointly. The £30 was not paid, nor were any bills given. The last supply took place on the second of April, 1845. The action was commenced on the 6th January, 1846.

There was no evidence given in this case as to the price of hops on the 23rd of January when defendant refused to carry out the alleged bargain, and it does not appear there was any setting apart with the knowledge of the defendant of any special twenty bales to answer the contract before such repudiation. There is thus nothing on which to make an estimate of the plaintiff's damages on which to enter a verdict for him if he was allowed to amend his declaration by declaring as for a breach of the special contract, and so there is nothing on which an amendment could be allowed, except upon the terms of the plaintiff's paying costs, and sending the case down to trial again.

There is no count for goods sold and delivered, and so if the plaintiff's account of the transaction be accepted, the plaintiff could not recover, without an amendment in this respect, for the four bales received and admitted. The plaintiff's and defendant's testimony are not reconcilable with each other; but, as the learned Judge attached more weight to the plaintiff's statement than to the defendant's, though the defendant's was in some respects sustained by that of his son, we should not interfere on the ground

that the plaintiff failed to establish a delivery and acceptance within the Statute of Frauds, as the learned Judge had the benefit of both seeing and hearing the witnesses, and was in a better position than the Court is to form an opinion of their credibility. The cases cited on the argument have no bearing on the point on which our judgment turns. If the plaintiff chooses to abandon all further claim, and reduce his verdict to \$100, he may amend his declaration by adding a count for goods sold and delivered, and the rule will be discharged without costs to either party. Plaintiff to elect within a month whether he will accept the alternative; if not, rule absolute for nonsuit.

HAGARTY, C.J., and ARMOUR, J., concurred.

Rule accordingly.

BELLAMY V. BARNES.

Lease—Covenant for quiet enjoyment—Ejectment by title paramount.

Defendant having executed a lease of certain premises to plaintiff, containing the ordinary statutory covenant for quiet enjoyment, plaintiff was subsequently ejected by the assignee of mortgages thereon, created prior to the lease, and thereupon brought an action against defendant for breach of the covenant in question; but, *Held*, that he could not recover, as the assignee of the mortgages was not a person "claiming by, from or under" defendant, but under the defendant's predecessor in title.

Held, also that the fact that the defendant had taken the estate subject to the mortgages and was to pay them off did not extend her liability under the covenant.

THIS action was brought upon the covenant for quiet enjoyment contained in the lease referred to in the preceding case of *Barnes v. Bellamy*, *ante* p. 303, to recover damages for the eviction therein also referred to.

According to the record, as entered for trial, the declaration alleged the covenant on the defendant's part to be that the plaintiff should, and lawfully might, peaceably and quietly hold, use and enjoy the said lands and premises for the said term without any lawful denial, hindrance, molestation, or interruption whatsoever of or by the defendant, her heirs or assigns, or any person or persons claiming through, under, or in trust for her; and charging, as a breach, that after the making of the said demise, and during the said term, William Laidlaw, then lawfully claiming the said lands and premises through and under the defendant, and having a good title to the same, and to the possession thereof through and under her, entered into the said lands and premises, and evicted the plaintiff therefrom.

The pleas were—1st. *Non est factum*. 2nd. That William Laidlaw did not enter into the said lands and premises and evict the plaintiff, as alleged, with other pleas unnecessary to be referred to; but no plea was pleaded denying that William Laidlaw claimed through and under the defendant.

Issue.

The cause was tried at the last Winter Assizes at Hamilton, before Cameron, J., and a jury.

At the trial the mortgages made by William Barnes to Romanes were put in and proved, dated respectively the 1st of June, 1874, and the 8th of April, 1875; the assignment thereof to Laidlaw, dated August 16th, 1877; the writ of summons in ejectment, in the action of *Laidlaw v. Bellamy*, dated August 20th, 1877, and an exemplification of the judgment recovered thereon by default on September 8th, 1877; the conveyance by Laidlaw to Osler under the powers of sale in the mortgages, dated October 15th, 1877; an indenture of bargain and sale of the demised land, made the 27th day of September, 1875, between William Barnes, of the first part, Robert Marshall, of the second part, and Jane Barnes, of the third part, by which William Barnes granted the said lands to Marshall in fee, to have and to hold to him, his heirs and assigns, to and for the sole and only use of the said Jane Barnes, her heirs and assigns, and to and for her and their sole and only use; and in which was contained a covenant by William Barnes that Jane Barnes should have quiet possession of the said land, free from all incumbrances, except those registered against the same, to be paid off by the said Jane Barnes (referring to the mortgages to Romanes, which were then registered). The lease upon the covenant, in which this action was brought, was also proved, and evidence given to shew the damages sustained by the plaintiff by reason of the eviction.

The lease purported to be made in pursuance of the Act to facilitate the leasing of lands and tenements, and the short covenant therein for quiet enjoyment represented under the Act the covenant that the plaintiff should and might peaceably possess and enjoy the said demised premises for the term thereby granted, without any interruption or disturbance from the defendant, her heirs, executors, administrators, and assigns, or any other person or persons lawfully claiming by, from, or under her, them, or any of them.

When the facts above stated were proved the learned Judge pointed out what had not suggested itself to the defendant's counsel, that Laidlaw was not a person claiming by, from, or under the defendant, and permitted the second plea to be amended by striking out the word alleged, and by the addition of the words lawfully claiming the same by, from, or under the defendant, and thereupon some amendment was made to the declaration which made it worse rather than better for the plaintiff.

The jury found that Laidlaw's only claim to the land was under the assignment to him of the mortgages made by William Barnes to Romanes, and they assessed the plaintiff's damages at \$180, whereupon the learned Judge entered a verdict for the plaintiff, with leave to the defendant to move to enter it for her on the second plea.

In Hilary term last *Osler*, Q. C., obtained a rule *nisi* accordingly.

May 27, 1879. *F. B. Robertson* shewed cause, citing *Hurd v. Fletcher*, 1 Douglas 45; *Carpenter v. Parker*, 3 C. B. N. S. 206; *Spencer v. Marriott*, 1 B. & C. 459.

Osler, Q. C., contra.

June 28, 1879. ARMOUR, J.—It is beyond question that upon the second plea, as amended, the defendant is entitled to have a verdict entered for her, because Laidlaw was not a person claiming by, from, or under her, but by from, and under William Barnes, her predecessor in title: *Merrill v. Frame*, 4 Taunt. 329; *Spencer v. Marriott*, 1 B. & C. 459.

The rule will therefore be absolute to enter a verdict for the defendant upon the issue to the second plea.

HAGARTY, C. J.—The lease is under the short form of leasing Act. It is to be noted that the statutable interpretation of the covenant for quiet enjoyment is merely, "without any interruption or disturbance from the lessor, his heirs, &c., or any other person or persons law-

fully claiming by, from, or under her, them, or any of them.'

It was very common to add such words as "or by or with his or their acts, means, consent, default, privity, or procurement." Many of the English cases turn upon the construction of these words, especially "default," "means," &c. See *Rawle*, ch. 6, ed. 1873, p. 125 ; *Sugden's Vendors and Purchasers*, 14th ed., 602-3, and the case of *Dennett v. Atherton*, L. R. 7 Q. B. 316.

The present case is simply a lease made by the owner of the equity of redemption mortgaged, before she acquired title, by her grantor. The fact that she took the estate subject to the mortgages, and that she was to pay them off, cannot, I think, affect her liability on the words used in the qualified covenant.

CAMERON, J., concurred.

Rule accordingly.

HAGERTY V. GREAT WESTERN RAILWAY COMPANY.

Action for false imprisonment—Reasonable and probable cause.

A spike having been found driven in between the rails on defendants' line of railway, plaintiff was arrested on suspicion of being the guilty party. The evidence against him was that he had been seen on the day the act was supposed to have been committed lounging about the railway bridge and track early in the afternoon for two or three hours, and that his boots would make prints corresponding with the footmarks about the place. Plaintiff having been acquitted brought an action against defendants for malicious prosecution, and the jury having given him damages, the Court, considering the insufficient nature of the evidence against him, refused to interfere with the verdict.

THE declaration stated that the defendants falsely and maliciously, &c., appeared before a justice of the peace, and charged the plaintiff with having unlawfully and maliciously driven a spike between the rails of the Buffalo and Lake Huron Railway Company, with intent to obstruct, &c., the engines, cars, &c., of the said railway, and on such charge procured the said justice to grant a warrant for apprehending the plaintiff, and caused the plaintiff to be arrested under said warrant, and to be imprisoned for a long time, and afterwards to be brought before the said justice, and afterwards to be committed and imprisoned in gaol, and there detained a long time, to wit, four weeks, on the said false and malicious charge, and afterwards to be brought before the County Judge and tried for the said charge, when the plaintiff was found not guilty, and was discharged out of custody, whereby the said prosecution was determined.

Plea : not guilty, by statute.

Issue.

The case was tried at the last Spring Assizes, at Goderich before Wilson, C. J. C. P., and a jury.

It appeared at the trial that a spike had been found on a Monday morning driven in between the rails on the defendants' line, close to Londesborough station, and the opinion was that it must have been so driven on the Sunday preceding.

The plaintiff, who lived then at Londesborough, was seen lounging about the railway bridge and track for two or three hours early on the Sunday afternoon. Early on Monday morning the spike was discovered. A detective named Day was sent for, and on Tuesday he measured some foot marks near and about the place. Rain had fallen in the interval. On hearing that the plaintiff had been seen there on the Sunday he proceeded to where he was working to examine his boots. It was said that on Sunday the plaintiff had gaiter boots on. There was a contradiction as to whether the plaintiff said he had the same boots on on Sunday, or another pair then at his boarding house. The detective obtained one of the boots, and stated that it corresponded with the foot marks. There was evidence shewing that the rain, &c., may have altered the marks. The plaintiff was arrested and kept nine days in gaol, and was acquitted on trial before the County Judge.

A nonsuit was moved for on the ground, among others, of the evidence shewing that there was reasonable and probable cause for the arrest.

The learned Chief Justice refused to nonsuit, and left several questions to the jury. They found that the boot marks were not those of the plaintiff's boots: that Day did not honestly believe that the foot marks were those of the plaintiff's boots, and there were not facts existing which gave rise to such honest belief: that the plaintiff did not tell Day, as the latter swore, about the boots: that it was at Day's instance that the magistrate drew the information, charging positively that the plaintiff had driven in the spike.

The jury found a verdict in favour of the plaintiff for \$200, and the learned Chief Justice left it to the Court, on the facts and findings of the jury, to say if the objections as to reasonable and probable cause should prevail or not.

May 20, 1879. *Irving*, Q. C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit on leave reserved at

the trial, or to enter a verdict for defendants, or for a new trial on the law and evidence.

May 29, 1879. *Bethune*, Q. C., shewed cause. The plaintiff's whole conduct pointed to innocence rather than guilt. There was no motive suggested for injuring the defendants. Besides, the act was done in broad daylight, when it is most improbable he would have committed it.

Irving, Q. C., contra. The whole question is, was there reasonable and probable cause for the plaintiff's arrest by the defendants? It is submitted that the evidence shews there was, and therefore the verdict should not be allowed to stand.

June 28, 1879. HAGARTY, C. J.—We think the learned Chief Justice quite right in refusing to nonsuit, and in submitting the case to the jury. If their findings be supported by the evidence the verdict is right, as they find all the questions against the defendants, and negative the existence of honest belief on the part of the detective.

In *Lister v. Perryman*, L. R. 4 H. L. 525, the language of Chief Justice Tindal, is quoted with approval, as laying down a sound formula: "In order to justify a defendant there must be a reasonable cause, such as would operate on the mind of a discreet man; there must also be a probable cause, such as would operate upon the mind of a reasonable man; at all events, such as would operate upon the mind of the party making the charge; otherwise there is no probable cause for him." *Broad v. Ham*, 5 Bing. N. C. 725.

Lord Chelmsford, at p. 535, says: "No definite rule can be laid down for the exercise of the Judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each Judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action. The verdict in cases of this description therefore is only nominally the verdict of a jury."

It seems to us impossible to lay down any rule of uni-

versal application, or to attempt to explain or reconcile the vast number of cases on this much discussed subject.

All we can do is, to apply some general principle to each case, such as those laid down in *Lister v. Perryman*.

We cannot say that the verdict rendered for the plaintiff is wrong. We cannot say, as a proposition of law, that there was reasonable and probable cause for his arrest; and even without the finding of the jury, we could hardly take it upon ourselves to rule that such existed.

On evidence palpably insufficient and shadowy, the detective chose to arrest this plaintiff and to subject him to many days imprisonment and serious injury.

With the strongest desire to say nothing to deter parties from the most vigorous prosecution of enquiry into criminal charges with a view to the discovery of the guilty, we still feel that there are other interests to be considered, and that a plaintiff, whose misfortune it was to have a pair of boots capable of making tracks similar to those found where the spike was driven, should not be, without very clear reasons, deprived of the moderate verdict he has recovered.

No motive whatever was suggested for his committing so villainous and dangerous an act. The circumstances of his lounging about the station about mid-day, conversing openly with others, can hardly amount to much.

The defendants' agent, on these very slight grounds, thought proper to institute criminal proceedings. We think they cannot reasonably complain of the result.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

MASSON V. ROBERTSON ET AL.

Railway—Award—Bond for value of land and compensation—Evidence in action on—Notice of award—Adding plea.

A railway, requiring immediate possession of the plaintiff's land, procured defendants to give their bond to plaintiff for the purchase money, conditioned to be void on payment or deposit in Court, under the provisions of the Railway Act, of the amount of the purchase money to be ascertained by arbitration proceedings then pending under said Act, within one month from the making of the award: *Held*, 1. That an award having in fact been made, its merits could not be tried in an action upon the bond. 2. That the award was not necessarily vitiated by reason of the arbitrators having allowed compensation for increased risk of loss by fire. 3. That in such an action the defendants could not examine one of the arbitrators to shew at what he estimated the value of the land, and whether general damages were awarded in addition to specific damages. 4. That it is not necessary before bringing such an action that a month should elapse after a written notice from one of the arbitrators to the defendants of the making of the award, as sub-sec. 19, sec. 20, ch. 165, R. S. O., applies merely to the right of appeal from the award.

No suggestion having been made as to any defect in title, and plaintiff's counsel offering at once to deliver a conveyance of the land to the company, the Court refused to allow a plea to be added denying tender of conveyance before action.

This was an action on a bond given by defendants to plaintiff, dated 16th October, 1878, subject to conditions, reciting that certain of plaintiff's lands were required by the Grand Junction Railway Company for the purpose of their road: that the Company required possession and could not agree with plaintiff as to the price and compensation; and that the necessary proceedings for arbitration had been taken under the Act, the condition being that if the Company within a month from making the award should pay to plaintiff or deposit under the Railway Act the money so to be awarded, the bond was to be void.

Averment—that the award was duly made on the 15th January 1879, for \$650, being a larger sum than that offered by the company, of which the company had due notice.

Breach—that they had not paid or deposited the money under the statute.

Pleas :

1. *Non est factum.*
2. Denial that any such award had been made.
3. That the company had not due notice of the making of the award one month before action.

Issue :

The case was tried at the last Spring Assizes at Napanee, before Cameron, J., without a jury.

The learned Judge declined to allow a plea to be added, denying that any deed had been tendered. It was urged that the company had not received notice of the award under the 3rd plea; but it appeared that two days after the execution of the award, defendant D. B. Robertson, who was also secretary to the company, wrote Mr. Masson, acting for plaintiff, asking him to furnish him with a copy of the award. On the back of his letter he signed an admission that he received a copy of the award. On this the company applied for and obtained a rule for setting aside the award, which was afterwards on argument discharged.

This action was commenced on the 22nd February. The condition of the bond followed the statute, and was for payment within a month from making the award.

It was argued that, under sub-sec. 19, sec. 20 of R. S. O. ch. 165, a month must elapse after a written notice from one of the arbitrators of the making of the award before an action would lie.

The award was executed by the referee of each party and by the umpire or third arbitrator, the County Judge. It awarded \$650 damages, in consequence of the land being taken, "which sum includes \$100 allowed for the risk to be borne by the owner against loss of his barns and sheds south of the railway track by fire being thereafter communicated thereto from locomotives which may be used on the track of the Grand Junction Railway.

This latter provision was objected to as vitiating the award.

The objections were overruled, and a verdict was entered for the plaintiff.

May 22, 1879. *H. Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict and enter it for the defendants, on the law and evidence, and on the ground that there was no valid award and no due notice of the publication ; and for rejection of evidence as to the items composing the award ; and to add a plea denying the tender of a deed.

Marsh, shewed cause. It is only necessary now to shew that an award was in fact made. The defendants must shew that the award was a nullity. The defence is not open where the action is not upon the award itself, but upon a bond. *Widder v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 521, 527, shews that there being no award as to costs does not invalidate the award. The validity of the award is covered by *Great Western R. W. Co. v. Warner*, 19 Grant. 506. The plea that no notice of the publication of the award was given to the defendants, is bad ; but, even if good, notice was fully proved. He also referred to *Duke of Buccleugh v. The Metropolitan Board of Works*, L. R. 5 H. L. 418 ; *Cummins v. Credit Valley R. W. Co.*, 21 Grant, 164.

H. Cameron, Q. C., contra. The award is preposterous, and must be got rid of. An appeal can still be made, because the month has not yet begun to run. The two clauses of the statute must be read together. The defendants are simply sureties under the statute. As to the necessity for a conveyance, this is not a technical defence, but goes to the very merits.

June 28, 1879. HAGARTY, C. J.—As to the construction of the statute contended for at the trial, the provision appears to apply merely to the right of appeal to a Superior Court Judge. Even if it applies to a right of action on the award, it would be hard for defendants to urge it after the course they took in applying for the award and moving against it.

It was not necessary for the arbitrators to specify the items composing the gross sum awarded. The sum of \$100 allowed for risk of fire to barns, &c., does not appear to us

to be necessarily objectionable. The words of the Act, are, (sec. 7, ch. 165,) "the value of lands, and for all damage to lands injuriously affected by the construction of the railway."

On the principles laid down in the well known case of *Duke of Buccleugh v. Metropolitan Board of Works*, L. R. 5 H. L. 418, we think a consideration of this kind may not improperly enter into the decision as to damages to lands injuriously affected. There the loss of privacy, the increase of dust and noise, &c., were allowed to be considered. In *Cummins v. The Credit Valley R. W. Co.*, 21 Grant 164, Proudfoot, V. C., considered an allowance of precisely this character a proper subject to be considered and allowed on an arbitration under the statute. We also refer to *The Great Western R. W. Co. v. Warner*, 19 Grant 506.

In the *Duke of Buccleugh's Case*, it was held, "that a referee might be asked (in the language of Lord Cairns) what had been the course which the argument before him had taken—what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation, *up to the time when he proceeded to make his award*. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict, if any such attempt should be made, what is to be found upon the face of that written instrument."

Lord Chelmsford says, "They had an undoubted right to know from him whether, in his estimate of the compensation, he took into consideration any matters not included in the reference, and therefore not within his jurisdiction. * * He alone could tell what subjects he included under the general terms of his award. But this having been ascertained, they were not at liberty to go further and ask the umpire what were the elements which entered into his consideration in determining the *quantum* of compensation."

We may also refer to the language of Mr. Baron Cleasby, in delivering his and other Judges' opinion to the House, at pp. 434-5-6: "There appears to me to be the strongest objection against allowing the umpire to be examined for the purpose of shewing what he intended to be included in the award. * * He might properly be questioned as to the subject of claims put forward and enquired into before him: he could not properly be questioned as to the matters which he included in or excluded from his award."

Defendant's counsel proposed to ask one of the referees what he put the value of the land at. This was objected to and rejected by the learned Judge, as the merits of the award could not be tried by him on that record.

He also proposed to ask whether they awarded general damages in addition to specific damages. This was an objection also rejected. We think the first question was clearly inadmissible. The second, we think (at all events in the shape in which it is put), is also inadmissible.

Questions might have been properly put to shew what was claimed on one side and admitted on the other, what in fact were the matters in discussion before the reference, but not as to how the referees arrived at their conclusion.

As to adding a plea of no deed being tendered, no suggestion is made as to any defect in title, and the counsel professes his client's readiness to at once deliver a conveyance of the land to the company.

We must therefore decline to allow such a plea.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

COLEMAN ET AL. V. MOORE ET AL.

Trust deed in favour of church—Provision for appointment of new trustees—Ejectment—Misjoinder—Right of surviving trustee to recover—R. S. O. ch. 216.

Land was conveyed to the plaintiff Coleman and four others as "the trustees of the congregation of the Independent Methodist Episcopal Church," with a provision, in case of death or ceasing to be a member of the said Church, for the appointment of a successor or successors. The congregation, acting under the directions of what was called the "Book of Discipline," which provided for an annual election of trustees, elected annually trustees for the property in question, and, among others, the plaintiffs. One of the original trustees under the deed died, and all the others, except the plaintiff, Coleman, ceased to be members of the Church. Subsequently three of the defendants accepted a lease of the property from Coleman. In ejectment by Coleman and his co-plaintiffs: *Held*, that these co-plaintiffs had been improperly joined with him, for that having been elected trustees under the "Book of Discipline," and not under the provisions of the trust deed, in place of deceased or disqualified members of the Church, they were illegally elected and never in fact became trustees, and their names were therefore ordered to be struck out of the record.

Held, also, that Coleman was entitled to recover against the defendants, who entered under the lease from him, as they could not deny his title, and there was sufficient evidence of disclaimer on their part to dispense with a notice to quit.

Held, also, that if the deed did not create the grantees, by virtue of R. S. O. ch. 216, a corporation, and they were to be regarded merely as natural persons, the legal estate was in Coleman and the other three surviving grantees under the deed, and Coleman was entitled to recover an undivided fourth part of the land; but that if the grantees were created a corporation, then the legal estate was in the corporation, or in the trustees in a corporate capacity, and Coleman was the only corporator, the others having either died or ceased to be corporators by reason of their having ceased to be members of the Church.

Objection having been made on the argument, for the first time, that the action should have been brought in the corporate name, or at any rate under the designation in the deed, the Court allowed the record to be amended in this respect, and the verdict to stand in favour of the plaintiff Coleman.

EJECTMENT for a lot of land in the town of Windsor.

The summons was addressed to the three first named defendants, who appeared and defended for the whole of the land therein mentioned, and the two last named defendants also appeared by consent and defended for the whole of the land.

The plaintiffs, by their notice, claimed title by virtue of a certain indenture of bargain and sale made to Coleman

Freeman, Branston Coleman, Samuel Venable, Edward Walker, and John Warren, trustees of the congregation of the Independent Methodist Episcopal Church, by Pierre H. Morin and Jane Langley Morin, his wife, bearing date the 2nd day of March, A.D. 1870, and as surviving and succeeding trustees of the said congregation, according to the provisions in the said indenture contained.

The three first named defendants by their notice, besides denying the title of the plaintiffs, asserted title in themselves, as follows:—

1. As grantees of the plaintiffs, or some or one of them, of the said land.

2. As lessees of the plaintiffs, or some or one of them.

3. As the trustees duly appointed for and in behalf of the Independent Methodist Episcopal Church at Windsor, and as such the successors of Coleman Freeman, Branston Coleman, Samuel Venable, Edward Walker, and John Warren, the original trustees named in the deed of conveyance of the said lands and premises made by Pierre H. Morin and Jane Langley Morin, his wife, to such trustees, whereby the said lands were vested in the said defendants, as such successors.

4. As the trustees duly appointed for and on behalf of the African Methodist Episcopal Zion Church at Windsor, and as such the successors of Coleman Freeman, Branston Coleman, and Samuel Venable, Edward Walker, and John Warren, the trustees originally named for and on behalf of the Independent Methodist Episcopal Church, and the grantees named in the deed of conveyance of the said lands and premises made by Pierre H. Morin and Jane Langley Morin, his wife, to such trustees, whereby the said lands became and were vested in the said defendants, as such successors.

The two last named defendants, by their notice, besides denying the title of the plaintiffs, asserted title in themselves to the said lands and premises, as trustees thereof for the congregation of the Independent Methodist Episcopal Church at Windsor, under and by virtue of a deed made

by Pierre H. Morin and Jane Langley Morin, his wife, to them and others, as their co-trustees, and they also asserted title in themselves as trustees for the African Methodist Episcopal Zion Church at Windsor.

The case was tried, without a jury, at the last Fall Assizes for the county of Essex, before Gwynne, J.

At the trial the deed referred to in the notices of title was put in and proved, dated March 2nd, 1870, between Pierre H. Morin and Jane Langley Morin, his wife, of the first part, and Coleman Freeman, Branston Coleman, Samuel Venable, Edward Walker, and John Warren, the trustees of the congregation of the Independent Methodist Episcopal Church, in trust for the uses and purposes thereafter mentioned, of the second part, whereby, after reciting that a religious society or congregation of Methodists, called the Independent Methodist Episcopal Church, residing in the town of Windsor, had occasion for, and were desirous of taking a conveyance for, the site of a church or meeting house, the parties of the first part granted the land in question unto the said parties of the second part, as such trustees as aforesaid, their successors and assigns, to have and to hold, unto the said parties of the second part, their successors and assigns for ever, upon the trusts and to or for the uses and purposes therein following, that is to say, in trust, that they should erect or cause or suffer and permit to be erected thereon a church, meeting house, or place of worship for the use of the members of the said congregation of the Independent Methodist Episcopal Church, to hold divine service therein and meetings in connection with the officers of the said church, according to the rules and discipline of the said church, which from time to time might be adopted and agreed upon by the ministers and preachers of the said church at their general conferences.

By this deed provision was made, in case of any one or more of the trustees, or any successor or successors of such trustees or trustee, dying or ceasing to be a member or members of the said church, according to the rules and

discipline aforesaid, for appointing one or more persons to fill the place or places of the trustee or trustees so dying or ceasing to be a member or members, and that the person or persons so appointed should be invested with and have and enjoy all the rights, privileges, and powers of the trustees named in the deed, and be subject to the same rules and regulations ; but no provision was made for the transfer of the estate to the new trustee or trustees, nor any other provision on the subject, but that referred to.

Evidence was given to shew that the said congregation placed upon the land in question a frame building which they had theretofore used as a church, and which they caused to be removed from the place it stood upon to the land in question: that the congregation continued to use the church until late in the year 1876, employing preachers to minister to them: that acting, as they supposed they should, under the directions on the subject contained in the Book of Discipline of the Independent Methodist Episcopal Church, which was put in, and which provided that where no specified requirement was made, the trustees of their church property should be elected annually, they elected annually trustees for the property in question. The last trustees that were elected were so elected in February, 1876, and were Branston Coleman, Richard Green, Marcus Coombs, Edward Haines, John Thomas, William Thomson, and R. T. Shewcraft. The latter had been elected a trustee in the year 1873 in the place of Samuel Venable, who had died shortly before, and on August 15, 1876, R. T. Shewcraft gave notice that he resigned all official standing in relationship to that church.

One Green, who was Bishop of the Independent Methodist Episcopal Church, resigned his charge in July, 1876, and this seemed to have led to some dissension among the members of the congregation, some wishing to join the British Methodist Episcopal Church, some the African Methodist Episcopal Zion Church, some the African Episcopal Church, and some, among whom were the plaintiffs, to continue as they were ; and on December 10, 1876, a

meeting was held, at which a resolution was passed to the effect that that body, being members of and a majority of the Independent Methodist Episcopal Church at Windsor, should adopt the discipline of the African Methodist Episcopal Zion Church for their religious government, and should apply for admission into that church. Among those voting for that resolution were the defendants Edward Moore, Edward Haines, John Thomas, Coleman Freeman, and William Thomson. Application was then made by the supporters of that resolution to the African Methodist Episcopal Zion Church, who received them into the Zion connection, and in the words of the record of the proceedings in the minute book produced, "then and there was organized the first African Methodist Episcopal Zion Church of Windsor, Ontario, Canada, by Bishop J. J. Moore appointing Rev. Moses L. Gales pastor, and the continuance of the leaders and trustees as they stood, that portion that connected with the new organization as recorded in the list of members prefixed."

Upon this being done, the plaintiff Coleman locked up the church, and kept it locked up till July 28th, 1877, when the following lease was made:—

"Windsor, Ontario, July 28, 1877.

Lease to the A. M. E. Z. Church of Windsor, Ont., of the Province of Ont., Canada, to the trustees of the said church for the purpose of holding divine service in. The trustees are John Thomas, Edward Haines, E. S. Moore, the trustees for A. M. E. Z.: for the consideration of \$1 per month they are to have the Church every Sunday and one night in the week, for which they are to pay \$1 per month, and find their own light and fuel and sexton, who shall clean the church after each week service. I, B. Coleman, will defend the church and the trustees against all parties that may attempt to interrupt you. The evening that we, as trustees, desire is Tuesday of each week, as well as each Sunday of each week.

Signed by us, all the trustees of the A. M. E. Z. Church.

JOHN THOMAS.
E. S. MOORE,
E. HAINES.

To B. Coleman, landlord of said church."

Coleman thereupon delivered a key of the church to these lessees, keeping one for himself. These lessees paid for two months rent, and then refused to pay any more. Some months after the refusal to pay rent, the plaintiff Coleman procured a preacher of the Independent Methodist Episcopal Church to preach in the church on a Sunday when it was not being used by the African Methodist Episcopal Zion congregation, and when the service was being held a number of the latter congregation, among whom were the defendants Edward Moore, Edward Haines, and Coleman Freeman, came and forcibly ejected the plaintiffs Coleman, Coombs, and the others of the congregation of the Independent Methodist Episcopal Church who were there.

In January, 1878, at a meeting said to have been called by the trustees of the defunct Independent Methodist Episcopal Church it was, as appears by the minute book produced, moved by Wm. Thomson, and *resolved*, that the property be conveyed to the African Methodist Episcopal Zion Church, with the membership, and an instrument was drawn up and signed, to the following effect :

“To all whom it may concern, we, the undersigned members of the defunct Independent Methodist Episcopal Church, seeing that our legal head is dissolved, and wishing to unite ourselves to some church having a living head or bishop, it was unanimously agreed that we unite ourselves with the African Methodist Episcopal Zion connection, also the property now belonging to the defunct Independent Methodist Episcopal Church, by a resolution that shall come under the jurisdiction of the said African Methodist Episcopal Zion connection.”

This was signed by a number of persons, and appended thereto was the following :

“We, the ground trustees, do agree to sign this according to the wishes of the above members of the Independent Methodist Episcopal Church.

“EDWARD WALKER,
“JOHN WARREN,
“COLEMAN FREEMAN, } Trustees.”

And further:—

“We, the undersigned trustees of the Independent Methodist Episcopal Church, do give the trustees of the African Methodist Episcopal Zion connection privilege to open said church to worship therein till further orders.

“ED. WALKER,
“COLEMAN FREEMAN,
“JOHN WARREN.”

No conveyance, if such were necessary, was ever executed, conveying the estate vested in the trustees named in the deed to any new trustee or trustees.

Of the trustees named in the deed, Samuel Venable died, and Coleman Freeman, John Warren and Edmund Walker, ceased to be members of the Independent Methodist Episcopal Church.

R. T. Shewcraft, elected under the provisions of the trust deed in place of Samuel Venable, deceased, ceased to be a member of the church.

Of the trustees last elected, in February, 1876, the plaintiffs adhered to the Independent Methodist Episcopal Church, and R. T. Shewcraft, John Thomas, Edward Haines, and William Thomson, ceased to be members thereof.

In August, 1878, the plaintiffs demanded possession of the land in question, and commenced this action.

The learned Judge found a verdict for the plaintiff Coleman, against all the defendants.

In Michaelmas Term last, *F. Osler*, moved to set aside the verdict, and to enter it for the defendants, on the ground that on the evidence the plaintiffs failed to prove their title to the land in question, and the defendants proved their title thereto; or to enter a verdict for the defendants Coleman Freeman and John Warren, on the grounds aforesaid.

May 29th, 1879. *Irving*, Q. C., shewed cause, referring to *Humphreys v. Hunter*, 20 C. P. 456; *Trustees of W. M. Church in Canada v. Grewer*, 23 C. P. 533.

Bethune, Q. C., supported the rule, and raised, for the first time in the course of the proceedings, the objection that the trustees named in the deed were a corporation, and that the action should have been brought in the corporate name, or at all events the plaintiffs ought to have sued designating themselves trustees under the name mentioned in the deed. He cited *Trustees of the Franklin Church v. McGuire*, 23 Gr. 104; *Berkley Street Church v. Stephens*, 37 U. C. R. 9; R. S. O. ch. 216, sec. 6.

June 28, 1879. ARMOUR, J.—It is clear that the plaintiffs Richard Green and Marcus Coombs are improperly joined as plaintiffs in any view of the case. The provisions contained in the deed as to the election of trustees must govern, and not those contained in the Book of Discipline.

These plaintiffs were elected under the provisions of the Book of Discipline and not under the provisions of the trust deed, and not being elected in place of any trustees dying or ceasing to become members of the church, were not legally elected and never became trustees.

The learned Judge who tried this cause has neither found for them nor against them, but he has found specially that the addition of their names has in no wise increased the costs of the suit, and we have no difficulty therefore in ordering their names to be struck out of the record.

The plaintiff Coleman is entitled to recover against the three first named defendants because they entered into possession under him and cannot be permitted to deny his title, and there is ample evidence of a disclaimer on their part so as to dispense with a notice to quit.

If the conveyance under which the plaintiff Coleman seeks to recover did not create the grantees, by virtue of the R. S. O., ch. 216, a corporation, or a body having a corporate capacity under the name of "The Trustees of the Congregation of the Independent Methodist Episcopal Church," and they are to be looked upon merely as natural persons, then the legal estate in the land is in the plaintiff Coleman, and in Coleman Freeman, Edward Walker, and

John Warren, and the plaintiff is entitled to recover an undivided fourth part of the land.

If, however, as Mr. Bethune contends, the grantees are thereby created a corporation, or a body having a corporate capacity, then the legal estate is vested in the corporation, or in the trustees in a corporate capacity, and the plaintiff Branston Coleman is now the only corporator, Venable having died, and the other trustees named in the deed having ceased to be corporators by reason of their having ceased to be members of the church.

Without adopting Mr. Bethune's view in its entirety, I think we ought to yield to it to the extent laid down in *Humphreys v. Hunter*; and, as the objection is now made for the first time, we ought in the interest of justice to amend the record by adding after the plaintiff's name the words, "The trustee of the Independent Methodist Episcopal Church," and discharge the rule.

The amendments will therefore be made and the rule discharged.

HAGARTY, C. J., and CAMERON, J., concurred.

Rule accordingly.

ROBINET V. PICKERING.

Dower—Report of commissioners binding—R. S. O. ch. 55.

The husband of demandant, being possessed of the land in question, a 100 acre lot, conveyed it to S., 20 acres being at the time cleared. After alienation some 70 acres more were cleared. The defendant having admitted demandant's claim, the sheriff appointed commissioners, who awarded demandant seven acres of the cleared and four of the uncleared land. The land in question, as well as that in the neighborhood, had greatly increased in value, and besides the clearing had been improved by fencing and buildings; but no part of the buildings was awarded to demandant. It appeared that the commissioners had considered the clearing of land a permanent improvement under sec. 35, subsec. 2, ch. 55, R. S. O., but that they did not award any portion of the land cleared by the purchaser to demandant:

Held, that the report should not be disturbed unless upon the clearest evidence of its injustice, and no case was made in the present instance to induce the Court to interfere.

Per ARMOUR, J.—The clearing of land for farming purposes is a permanent improvement.

DOWER.

The facts were as follow :

George Robinet, the husband of the demandant, was seised in fee of the East half of lot 4, in the 2nd concession, east of the centre road, in the township of Chinguacousy, and being so seised, on the 30th of January, 1830, conveyed the same, for the consideration of £100, to one Silverthorn, under whom the tenant claimed.

At the time of the said conveyance there was a small log house which had been built in 1821 on the land, and the land was cleared to the extent of from 15 to 21 acres.

The tenant acquired the land in 1873 and paid \$5,200 for it, since which time he expended about \$1,300 in buildings upon it, and improved it by fencing, picking stones, and straightening a creek upon it.

The land was all cleared except about nine acres at the time of Robinet's death, and all the cleared land was under cultivation.

Upon this action being brought by the demandant to recover her dower in the land in question the tenant appeared and acknowledged that he was tenant of the freehold and consented that the demandant might have judgment for her

dower therein, and might take the proceedings authorized by the Dower Procedure Act to have the same assigned to her.

The demandant thereupon signed judgment, and sued out thereon a writ of assignment of dower, directed to the sheriff of the proper county, who upon receipt thereof duly appointed three commissioners, as required by the said Act, to admeasure the said dower, and to make and return to him a report of their proceedings and determination in the execution of the duty assigned to them.

The said commissioners having duly taken the prescribed oath, and having heard evidence, and counsel for both parties, reported to the said sheriff that they had unanimously agreed that the demandant was entitled to seven acres of cleared land and four acres of bush land, as her dower in said land, which they admeasured, designated and laid off, in their report, by metes and bounds.

In Hilary Term last *Ogden* obtained a rule *nisi*, on behalf of the demandant, to set aside the report of the commissioners, or to vary or amend the same, or to refer the same back to the said commissioners, or to refer the matter to other commissioners, with directions to them to assign to the demandant, as her dower in the said land, one-third thereof, or such portion as the Court should consider reasonable, on the following grounds: That such report did not contain a full statement of their proceedings as defined by the Act, and did not shew what part, whether meadow, arable, pasture or woodland, or how much of either was given to plaintiff; and on the ground that defendant, by admitting the right to dower in the said land, and allowing judgment to be signed therefor, admitted her right to dower in the entire lot, and plaintiff was therefore entitled to her full third; and on the ground that the said commissioners did not give and admeasure to said plaintiff the full amount of land to which she was entitled as her dower in said land: that, according to the evidence, at the time the plaintiff's husband alienated said land there was

twenty acres cleared : that at the time of the death of the plaintiff's husband there were nine acres still uncleared : that about 70 acres had been cleared by the purchaser and his assigns between the date of the sale by the plaintiff's husband and his death : and that the commissioners had not given plaintiff any part of the lands as embraced or contained permanent improvements ; and such commissioners had only awarded and set apart, as plaintiff's dower, eleven acres, which was not sufficient to cover her dower, nor was it all she was entitled to : that such commissioners had contended that clearing land or clearing this bush was a permanent improvement, and had refused to allow plaintiff any portion of the land cleared by the purchaser since alienation, or if any, then a very small portion, though it appeared that the land so cleared would have been of more value at the date of the husband's death, wooded or unwooded, than as cleared.

He also moved, on the affidavit of the demandant's solicitor, that he believed the commissioners held that the demandant was not entitled to dower in seventy acres of the said land, " either because it was uncleared at the time of alienation, or that the fact of the purchaser having cleared it they considered a permanent improvement, and that such permanent improvement nearly or entirely deprived the plaintiff of any dower in such part of the lot ;" and that after the evidence was taken he asked the commissioners " to make a full statement of the particulars of the land they would give the plaintiff, and to set the same out in their report, and to state if they considered clearing land a permanent improvement under the circumstances," and that he had since asked Mr. Unwin (one of the commissioners) for said information, but he declined to give it ; and that he (deponent) believed the commissioners, from what he had heard, had not allowed the plaintiff any portion of said seventy acres.

May 30, 1879. *Fleming* shewed cause, citing R. S. O. ch. 55, secs. 20, 35 ; *Humphrey v. Phinney*, 2 Johns. 484 ;

Dorchester v. Coventry et al., 11 Johns. 510; *Jackson v. Schutz*, 18 Johns. 179; *Coates v. Cheever*, 1 Cow. 460; *Norton v. Smith*, 20 U. C. R. 213.

McMichael, Q. C., (*C. McMichael* with him), contra.

June 28th, 1879. ARMOUR, J.—It was at one time a question involving some doubt in England whether, in a case like the present, a widow should have a third part of the lands according to their value at the time when her husband aliened them or at the time of his death.

The doubt on this subject was however removed by the case of *Doe Riddell v. Gwinnell*, 1 Q. B. 682, decided in 1841, which determined that she was entitled to such third part according to the value at the time of her husband's death.

This Court had previously arrived at a different conclusion, in the case of *Robinet v. Lewis*, Dra. Reps. 260, decided in 1830.

The Courts in the United States have uniformly held that the widow should take no advantage of improvements of any kind made by the alienee, but that throwing those out of the question she should be endowed according to the value at the time her dower should be assigned to her.

In *Norton v. Smith*, 20 U. C. R. 213, decided in 1860, this Court chose to follow *Robinet v. Lewis* and the American decisions rather than the case of *Doe Riddell v. Gwinnell*, and held that the damages of the widow from the time of demand made "should be calculated upon the average value of the land through that period, irrespective of improvements put on by the tenant, standing in the place of the alienee of her husband;" and that, "with respect to the future allowance to the widow in lieu of dower, it should be estimated upon a computation of one-third of the occupation value of the ground, irrespective of the improvements upon it which have all been made since the alienation of the land by the husband, making an allowance (if it can be done on any satisfactory data) for any probable variation in the value of the land from causes independent of improvements."

Lord Denman, in *Doe Riddell v. Gwinnell*, pointed out the difficulty of arriving at such a calculation and estimation, as did also this Court in *Norton v. Smith*, but this Court also in that case adverted to the fact that such a difficulty was one which juries and arbitrators have very frequently to encounter.

The view taken by this Court, in *Norton v. Smith*, was subsequently adopted by the Legislature in passing the Act 24 Vic. ch. 40, and forms the foundation of the law as it at present exists.

The provision applicable to the case in hand, and under which the commissioners made their report, is contained in R. S. O. ch. 55, sec. 35, sub-sec. 2: "It shall be the duty of the commissioners to ascertain and determine what permanent improvements have been made upon such lands and premises since the death of the plaintiff's husband," (if he had died seised), "or" (if he had alienated) "since the time her said husband alienated the same to a purchaser for value, and if it can be done they shall award the dower out of such part of the lands as do not embrace or contain such permanent improvements; but if that cannot be done, they shall deduct either in quantity or value from the portion to be by them allotted or assigned to the plaintiff, in proportion to the benefit she may or will derive from the assignment to her as part of her dower of any part of such permanent improvements."

Now, if the commissioners in this case have assigned to the demandant a portion of the land in question, the beneficial enjoyment of which by her in the condition in which it was at the time of such assignment will be to her equal in value to the beneficial enjoyment by her of one third of this land had it remained up to that time in the same condition as it was at the time of its alienation by her husband, they have done what in my opinion the law required them to do, and I must assume that they have done so unless the contrary clearly appears.

I see nothing whatever in the proceedings and evidence brought before us to warrant me in impugning either the

honesty of purpose of the commissioners or the justness of the conclusion at which they have arrived, and the demandant has not chosen to attempt to impugn either the one or the other by means of affidavits shewing any grounds for doing so.

These commissioners are appointed by the sheriff; two of them are to be resident freeholders of the county rated for real estate at not less than \$2000 each, and the third a Provincial Land Surveyor; each of them to be eligible to serve as a juror between the parties; each to take an oath that he is not of kin to either party, nor interested in the land out of which dower is to be assigned, and that he will honestly and impartially and to the best of his skill and ability execute and perform his duty as such commissioner.

The Legislature no doubt deemed that such a tribunal would be one the best fitted to perform the duty assigned to it, that could be designed. I agree that it is, and I think that its decision should not be questioned except upon the clearest evidence of its injustice.

I see nothing in the form of the report at which to cavil. The evidence showed the land in question to consist wholly of woodland and arable land, and the report assigns to the demandant four acres of the woodland and seven acres of the arable land, and sets the same out by metes and bounds.

The commissioners were in no way bound to set out the reasons for the decision at which they arrived.

I see nothing to justify the assertion that they excluded the seventy acres cleared since its alienation by the husband, from their consideration; on the contrary, I think the fair inference from their finding is that they took it into consideration.

The affidavit filed in support of this assertion is at best a mere guess at the way by which they arrived at their decision.

There is, in my opinion, no ground for the contention that the clearing of land useful only for farming purposes is not a permanent improvement.

What were and were not permanent improvements was a question of fact, determinable by the commissioners.

I think the rule should be discharged.

I refer also to *Wallace v. Moore*, 18 Gr. 560 ; *Morton v. Lewis*, 16 C. P. 485.

HAGARTY, C. J.—The difficulty I feel in this case is, that there is nothing before me to induce a belief that the award of the commissioners is not fair and reasonable.

In that view, unless demandant's counsel can point out any illegality either in the proceedings themselves or the report or record thereof, I cannot see our right to interfere.

The case presented some peculiar features. The demandant's husband had alienated nearly half a century ago, the land then being worth perhaps \$600 or \$800. It is now, with improvements, said to be worth about \$7,000, a ten-fold increase. She is awarded seven acres of cleared land and four of the small portion of wood land remaining.

I have read the evidence more than once, and fail to see any alleged injustice or illegality.

I cannot see that the course taken by the commissioners was not justified under sub-sec. 2, sec. 35, of the Dower Act.

Dr. McMichael suggested that the clearance of land does not come under the head of "permanent improvements." I do not take that view. Sec. 3 of ch. 126, R. S. O., speaks of dower not being allowed out of a lot in a state of nature and unimproved by clearing, fencing, or otherwise, for the purpose of cultivation or occupation.

I cannot hold as a matter of law that the reduction of forest land into a high state of cultivation cannot be regarded as a permanent improvement. The fact that in some localities timbered land may now be worth more than the same land cleared, does not affect the question in my judgment. I think this was a matter for the decision of the referees.

Then, under this sub-sec. 2, after ascertaining the permanent improvements since alienation, if it can be done, they are to award dower out of such part of the lands as

do not embrace or contain such permanent improvements; but if that cannot be done, they shall deduct either in quantity or value from the portion to be by them allotted or assigned to the plaintiff in proportion to the benefit she may or will derive from the assignment to her of any part of such permanent improvements.

In this view the referees had to adopt some such course as they have taken.

I know of no decision, either in dower cases or in those for payment of improvements under erroneous surveys, attaching a legal meaning to the words.

Then, as to the legal form. They are to report (subsec. 5) in writing, subscribed by them and directed to the sheriff, and it shall contain a full statement of their proceedings, and when dower is assigned by metes and bounds shall distinctly point out and describe the same and the posts, &c.

It seems to me that the commissioners have fairly and sufficiently adopted the prescribed form. They state all they have done, and award 7 acres of the cleared land and 4 acres of the wooded land, carefully specified by metes and bounds, and annex to the report all the evidence, &c., taken before them.

I think it would be unfair to such a tribunal to scrutinize their report in a too minute criticism of form. Unless we hold that they were bound to state the reasons that governed their decision I think they have sufficiently complied with the law.

CAMERON, J., took no part in the judgment, having been concerned in the case at the bar.

Rule discharged.

IN RE THOMAS HAISLEY AND MARGARET LUNDY AND OTHERS,
EXECUTRIX AND EXECUTORS OF WILLIAM LUNDY.

*Landlord and tenant—Covenant to pay for buildings—Construction of—
Assignee of chose in action—R. S. O. ch. 116, s. 7.*

Lessor covenanted with lessee that he would at the expiration of the term pay him, his heirs or assigns, a valuation for his buildings on the land demised: *Held*, CAMERON, J., dissenting, that the covenant was neither wholly spent in the event of destruction by fire of the building then in existence, nor necessarily limited to the then value of the existing building, but that the increased value of subsequently erected buildings could be claimed, at the expiration of the term, against the landlord.

Held, also, affirming the judgment of WILSON, C. J., that the assignee of the term, and of all claims under the covenants in the lease, could, as the assignee of a chose in action, sue in his own name the executors of the covenantor, under R. S. O. ch. 116, sec. 7.

THIS was an appeal from a judgment of Wilson, C. J., sitting for the full Court.

The matter came before the Court on certain questions submitted by arbitrators, in making their award, for the opinion of the Court.

The facts were as follow:—

There was a lease by indenture, not made under or according to the statute, between William Lundy, of the first part, and John Haisley, of the second part, for eight years from the 1st of July, 1870, at a rental of \$36 per annum.

The covenant in question was:—

“And the said lessor covenants with the said lessee for quiet enjoyment, and that he will at the expiration of the said term hereby granted pay the said lessee, his heirs or assigns, a valuation for his buildings on the said lot, such valuation to be decided by arbitration in the usual way, in case the said parties cannot agree themselves.”

The lessee, by mortgage on the 30th of June, 1877, assigned the lease to Thomas Haisley, to secure the sum of \$800.

John Haisley became insolvent, and his assignee in insolvency, George Kempt, with the advice and consent of the inspector of the estate, assigned all interest in the demised premises to Thomas Haisley.

William Lundy, the lessor, died in the spring of 1878, having by his will appointed Margaret Lundy and others to be the executrix and executors of the same.

There were buildings on the premises at the date of the demise of the value of \$800, the property of John Haisley, the lessee.

These buildings were destroyed by fire, together with other buildings adjoining the property of the lessor or of his tenants, about the 1st of July, 1871. The lessee, in the fall of 1871, or the following spring, erected buildings on the said premises, which at the expiration of the lease were worth \$1,300.

There was no agreement between the lessor and the lessee as to the erection of these last buildings; but the lessor and the other tenants of his on the adjoining lands, and the lessee, desired that all the buildings should be as nearly uniform in appearance as possible, and they formed one continuous block of nearly uniform height and appearance; but it did not appear the lessee so built by any arrangement with the lessor, or that he knew of the lessor's desire to have the buildings uniform as aforesaid. The lessee, for anything which appeared, put up the buildings in a manner and style the most suitable for his business and convenience; and the lessor saw the buildings in the course of their erection, but did not direct or control the lessee in respect of them.

The Court was to determine whether Thomas Haisley, as such assignee of the lessee, was entitled to recover the value of the buildings; if not, he was to pay all the costs of the reference; if he was entitled, the Court was to say whether the value of the buildings was to be estimated at \$800 or \$1,300, and whichever sum was allowed, the sum of \$95.55, for arrears of annual taxes, was to be deducted.

It was also stated as a fact that the claimant, Thomas Haisley, proved his claim on John Haisley's estate at \$715.

The case came on for argument on Tuesday, the 21st of January, 1879, when *J. B. Dickson* appeared for Thomas Haisley.

Robinson, Q. C., contra.

February 4th, 1879. WILSON, C. J.—I think it will not be necessary to go over the many cases which were cited on the argument.

There were buildings on the demised premises when the lease was made to John Haisley. The lessor covenanted for himself only to pay to the lessee *or his assigns* a valuation for his buildings.

The lessor did not assign his interest. His estate, by means of the proceedings which have been taken against his personal representative, is sought to be made liable.

It is not, however, the lessee who takes these proceedings, but *his assignee*. The covenant by the lessor is to pay the lessee or his assigns for the buildings.

If the lessee had been bound to build a house upon the demised land, that would certainly have been a thing which touched and concerned the inheritance, and if the lessee had covenanted as well for his assigns as for himself to do so, his assignee would have been liable upon the covenant as well as himself.

If in either of such cases the lessor bound himself to pay for the building of the house at the end of the term to the lessee or his assigns, why should not the covenant as to payment be held to touch and concern the inheritance as well as the covenant to put up the house?

If the covenant to pay do in such a case affect or concern the inheritance, then the lessor may bind himself to pay the value of the house as well to the assignee as the lessee, and that is what he has done in this case.

He has covenanted to pay the lessee or his assigns the amount of such valuation.

The case of *Grey v. Cuthbertson*, 2 Ch. 482, 4 Dougl. 351, seems to be applicable. There the lessee covenanted to lease all the trees he planted during the term, and the

lessor covenanted for himself, his executors and administrators, but not for his assigns, to pay for the trees at a fair valuation, by two persons to be named by each party, their executors, administrators and assigns. The assignee of the lessor refused to name an arbitrator, on which the lessee brought an action of covenant against the assignee of the lessor: *Per Curiam*—"The plaintiff is not without remedy. He may bring an action against the original lessor, who always remains liable; but his right of action for a breach of this covenant cannot be extended to an assignee without his being named in the covenant, as the subject matter of it does not relate to a thing in *esse* at the time of the demise."

The same case in 4 Dougl. 351, is not to the same effect. Lord Mansfield said: "We are all of opinion, on the authority of *Spencer's Case*, that the covenant to name an arbitrator does not run with the land, and consequently does not bind the assignee."

In this case there was no covenant to put up a new building. If there had been a covenant by lessee to repair, the new building put up in place of the one destroyed by fire would have been a reparation which the lessor might have been bound to pay for to the lessee or his assigns, although the assigns were not named, if the old building stood upon the place at the time of the demise.

There was a building in fact upon the demised land at the time of the demise made, which appears to have been the property of John Haisley, the former tenant, and who took a new lease. If that building had remained on the land at the end of the lease, the lessor's covenant to pay for it would, I think, have been enforceable by the assignee of the lessee, although he was not named in the covenant by which the lessor bound himself to pay for the building.

The proceeding is not for not naming an arbitrator. The arbitration has been held, and the action is for not paying the valuation which has been made, and which the covenantor engaged to pay the lessee or his assigns.

As this is an action by an assignee of the lessee against

the representative of the lessor, and not an action against the assignee of the lessee, this action may be maintained under the R. S. O. ch. 116, sec 7, in the assignee's own name.

It is unquestionable he might have used the name of the lessee for the recovery of the money if the Chose in Action Act had not been passed, and if the assignee could not, under the previous law, have sued in his own name.

I think, however, within the rule of *Spencer's Case*, and on the authority before mentioned, he may sue in his own name, and he certainly may do so under the Chose in Action statute before mentioned.

The plaintiff is not bound by the amount he valued the security at in the insolvency proceedings, \$715, and by his being permitted to rank for the excess of his claim (\$101) above such valuation.

If it were fraudulently done, so as to deceive the creditors or their assignee, they may get relief against Thomas Haisley. But in that case the amount awarded would belong to the creditors. It would make no difference to the representatives of the lessor, who had been in no way prejudiced by anything which Thomas Haisley had done in the valuation he had made or by his proving upon the estate.

I confess it would be more in accordance with the true rights of the parties if Thomas Haisley could be restricted to the actual amount of his claim against John Haisley, and if the creditors of John Haisley received the difference between that sum and \$1204.48 [$\$1300.00 - \$95.52 = \1204.48], which would be about \$400, which Thomas Haisley is not very righteously claiming, and without value.

I feel obliged to say that Thomas Haisley is in law entitled to the \$1,300, less the sum of \$95.52 or \$1,204.48.

May 26, 1879. *Robinson*, Q. C., now appeared for the appeal. The whole question turns upon the construction of the lease and the rights of the parties under it. What is the meaning of the covenant? *Crozier v. Tabb et al.*, 26 C. P. 369, may be referred to. It is a collateral covenant.

Thomas v. Hayward, L. R. 4 Ex. 311; *Spencer's Case*, 1 Sm. L. C. 6th ed., 45; *Redman* on Landlord and Tenant, 216, 217; *Woodfall's* Landlord and Tenant, last ed., 146, 819.

Bethune, Q. C., (*J. B. Dickson* with him) contra, referred to *Cooke v. Chilcott*, L. R. 3 Chy. D. 694, 701; *Daniel v. Stepney*, L. R. 9 Ex. 188; *Minshull v. Oaks*, 2 H. & N. 793; *Williams v. Earle*, 9 B. & S. 740.

Robinson, Q.C., in reply, referred to *Robinson & Joseph's* Digest, 2076.

June 28, 1879. HAGARTY, C. J.—The point chiefly pressed before us seems to have been but slightly noticed before Wilson, C. J., as to the time when the value should be appraised on the tenants buildings, and whether the covenant applied to any other buildings than those then in existence.

“And said lessor covenants,” &c., “that he will, at the expiration of the said term hereby granted, pay said lessee, his heirs or assigns, a valuation for his buildings on the said lot, such valuation to be decided by arbitration in the usual way, &c.

If the building in existence at the making of the lease had remained unchanged, there would have been no question as to the object of the covenant. If it had been much out of repair, or became so dilapidated as to require large expenditure to restore it to usefulness, I think the increased value, as it stood at the end of term, could be valued and claimed against the landlord.

It would naturally be in the contemplation of both parties that the existing buildings might be burned or require extensive repair. For the enjoyment of this (a town property) and the payment of the rent reserved, it would be imperative on the tenant to have suitable buildings. If insured, he would probably rebuild. Then they stipulate that at the end of the term the landlord gets the property as it stands, and he agrees to pay the tenant the value “for his buildings.”

I am unable to put any other construction on the bargain than that whatever buildings the tenant should have, at the end of the term, the landlord should take at a valuation.

There is no finding or suggestion that any thing unreasonable was erected, or any attempt made to found a claim for larger damages against the landlord. On the contrary, we might infer from the facts found that the new buildings were understood, although not expressly bargained for, to be uniform with the adjoining buildings of the landlord.

I cannot think that the covenant is either wholly spent in the event of the destruction by fire of the building then in existence, nor that it was necessarily limited to the then value of the existing buildings.

As I agree with the learned Chief Justice that the plaintiff can maintain the action in his own name against the covenantor's executors under the R. S. O., ch. 116, sec. 7, as the assignee of a chose in action, it is unnecessary to enter upon the rather tangled decisions that have occurred since *Spencer's Case*, as to covenants running with the land, and the right of the assignee or lessee to sue therefor. The plaintiff was the assignee of the term by way of mortgage, and also of the lessee's equity of redemption therein under the assignee in insolvency.

ARMOUR, J.—I also think the judgment should be affirmed.

In construing the covenant in question we should pay no attention to the acts of the parties or the interpretation they may have put upon it, but should deduce the true meaning and intention of the covenant from the instrument containing it without reference to extrinsic facts, and if the words of the covenant are ambiguous, or words *in equilibrio*, they are to be taken most strongly against the covenantor, the maxim being *verba chartarum fortius accipiuntur contra proferentum*.

There is nothing in the lease before us to enable us to say that there were any buildings on the demised pre-

mises at the time of the making of it, and the words of the covenant being that the lessor "will, at the expiration of the said term hereby granted, pay the said lessee, his heirs, or assigns, a valuation for his buildings on the said lot, such valuation to be decided by arbitration in the usual way, in case the said parties cannot agree themselves," point clearly to what will be the condition of things at the expiration of the lease, and are referable solely to that time, and the words "his buildings" mean any buildings which the lessee may have on the demised land at the expiration of the term.

Were we, however, permitted, in construing this covenant, to deduce the true meaning and intention of it from the extrinsic facts brought before us, I think the conduct and conversation of the lessor, while the buildings were being erected, afford abundant proof that he expected and intended to pay for the buildings which the lessee was then erecting.

If the words of the covenant were referable only to the buildings upon the demised land at the time of the making of the lease, there would be no claim for compensation, for they were totally destroyed by fire before the expiration of the term.

The lessor's representatives were certainly not of this opinion, or otherwise they would not have submitted to the arbitrators "whether or not the said Thomas Haisley is entitled to receive compensation *as assignee* of the said covenant in the said lease mentioned, and if found so entitled, then to fix the compensation due thereunder to him."

CAMERON, J.—I am of opinion that the true construction of the covenant is, that the lessor would pay for the buildings at the time of the covenant on the place their value at the expiration of the term: that the parties did not contemplate the erection of other buildings, and that the covenant ought to be construed by the state of things then existing: that the words "his

buildings," in the covenant, would apply to the buildings then existing, and not to buildings to be thereafter erected : that parol evidence was admissible to shew there were buildings then on the premises, and thus form a guide to the construction of the covenant. Though it is not so found by the arbitrators, it was conceded on the argument the old building occupied the full front of the lot, and there were out-buildings ; so there was not merely a building on the place, but buildings to which the term "buildings," in the plural, in the covenant could apply. To hold, in this state of things, that the covenant was intended to apply to subsequent erections is, it appears to me, to do violence to the language used. If a man demises vacant land, and covenants to pay the lessee for his buildings, he must be taken to intend that the lessee may erect buildings, as otherwise no application could be given to the words ; but when the lessee has buildings, at the time of making the covenant, to which it can apply, it would be giving to the words used a signification beyond their ordinary import, namely, to make the words "his buildings," which ordinarily mean buildings he now owns, include buildings hereafter to be erected and owned by him. If a man demises vacant land, and covenants to pay the lessees for buildings, without making any stipulation as to the character of the buildings, he thereby leaves the kind of buildings to be erected in the discretion of the tenant, and it would be doing no injury to him to make him pay for them, no matter what their character. But it might be the very greatest injustice to a landlord to hold that when he covenants to pay his tenant for his buildings—the buildings then answering the description being only worth \$1,000—the tenant would have power to remove the buildings and erect others at a cost of \$10,000, and require him to pay therefor. In this case it is true the excess in value of the new buildings over the old was only \$500 ; but the principle is the same, and if the landlord can be compelled to pay \$100 more than the admitted value of the old, he

may equally well, as far as principle is involved, be obliged to pay \$10,000.

As a consequence of the view I take, the landlord in strictness should not be bound to pay anything for the new buildings, as they are not what he covenanted to pay for; but I think, as he did not object, or rather did not intimate to the tenant that he would pay him nothing for the new buildings—he was not bound to object to the building or its character—he may fairly and equitably be held liable for the value of the old buildings.

The covenant, moreover, is, taking it literally, open to the construction that the value of the building at the date of the lease was what was to be paid at the expiration of the term, the then present value to be paid at a future time.

The case of *Crozier v. Tabb*, 26 C. P. 369, cited by Mr. Robinson on the argument, approaches nearer in its circumstances to this case than any that I have been able to find. In that case the covenant was, that the lessee “would take proper care of the fruit trees. There were fruit trees on the demised premises at the time of the making of the covenant, and fruit trees were subsequently planted, and the Court held that the covenant only had reference to the first mentioned trees. In delivering judgment Mr. Justice Gwynne, said, “*Prima facie*, in our judgment, the covenant is confined to the fruit trees then already planted and growing upon the premises. If the subsequently planted trees had been planted in pursuance of a verbal agreement subsequently made and entered into between the parties, we should equally be of opinion that the covenant could not operate upon them.” The principle involved in this decision is, that such a covenant is to be construed in reference to the state of things existing at the time it is entered into, and if this is the right conclusion to draw from the decision, there is no difference between the cases; and this case cannot be decided in favour of the plaintiff without overruling that decision.

I think the plaintiff can maintain the action whether the covenant runs with the land or not, as he is

assignee of the covenant as well as of the term, and the defendants are liable as the personal representatives of the testator for breach of this covenant, if it has been broken. The assignments made of the term were, I think, sufficiently assented to to prevent a forfeiture, the assent, by the terms of the lease, not being required to be in writing ; but were it otherwise, under the view I take of the covenant in question, the plaintiff would be entitled to be paid for his buildings at the expiration of the term. The award should be in the plaintiff's favour for the sum of \$704.48.

Judgment affirmed.

MUTTLEBURY V. KING AND BUCHANAN.

Registry Laws—Plan—Description of land.

M. was owner of the east half of a certain lot of land. In 1872 he employed one S. to draw a plan of a portion of the lot, upon which some lots were lettered and others numbered. The land in question was marked on the plan as "The Parsonage," but was neither numbered nor lettered. The plan so marked was never registered. In 1874, M. mortgaged to B., one of the defendants, the said half lot, "reserving thereout lots numbered from 1 to 181, both inclusive, as shewn on a plan made by S., and dated 1872"; and during negotiations for the loan M. left a lithographed copy of the plan in B.'s possession. B. registered the mortgage, but took no steps to register the plan. Subsequently M. altered his plan by running a street through lots 106 and 115, and transferred the number 106 to the parsonage lot. The date of the plan remained as 1872, and M. then registered it in its altered state. In 1876 M. applied to the plaintiff for a loan of \$600 upon lot 106, or the parsonage lot. An abstract was obtained by the plaintiff from the registrar, from which the prior mortgage from M. to B. was omitted, the registrar considering that inasmuch as lots 1 to 181 inclusive were excepted from B.'s mortgage, the property in question was not affected by it. A mortgage was then made by M. to the plaintiff. In ejectment by the plaintiff against B.:

Held, that defendant's title must prevail—1. That no obligation was cast upon B. under the registry laws or otherwise to register the plan, which was only referred to in describing the reservations from the mortgage. 2. That B.'s title was complete by registration of his mortgage on the township lot. 3. That if from any cause the exception or reservation from the property mentioned in B.'s mortgage proved abortive or ineffectual, B. was entitled to the excepted portion also.

EJECTMENT for part of the east half of lot No. 9, in the 9th concession of the township of Maryborough, in the

county of Wellington, and known as lot 106, or the "Parsonage," according to a plan by M. C. Schofield, P. L. S.

The plaintiff claimed title by deed (a mortgage) from the Rev. George C. Moore, dated September 29th, 1876, and the defendants, besides denying the plaintiff's title, asserted title in the defendant Buchanan, by virtue of a mortgage to him from Moore, dated February 4th, 1874; and also under a final order of foreclosure in the Court of Chancery, dated October 3rd, 1877, which was founded upon the mortgage to Buchanan aforesaid.

The case was tried at the last Spring Assizes at Guelph, before Burton J., without a jury, when the following facts appeared:—

The Rev. George C. Moore was the owner of certain property comprising the east half of lot 9, in the 9th concession of Maryborough. In 1872 Moore employed one Schofield, a Provincial land surveyor, to make a plan of a portion of this property, on which the village of Moorefield was built. A plan was accordingly drawn and copies of it printed, upon which various lots were laid off, some of which were numbered and some lettered. In the centre of the village was situated a lot called "The Parsonage," which was so marked on the plan, but this lot was not numbered. Moore did not register the plan, but took a printed copy to Alexander Buchanan, on which was shewn the parsonage lot without any number or letter, one of the defendants, and executed a mortgage to him for \$12,000, on "the east half of lot No. 9, in the 9th concession of the said township of Maryborough, containing one hundred acres more or less, reserving thereout and therefrom lots numbered from one to one hundred and eighty-one, both inclusive, lots A and B, and the streets in the village of Moorefield, all of which said lots and streets are shewn on a map or plan of the said village of Moorefield, made by M. C. Schofield, P. L. S., for the mortgagor, dated 1872, and reserving also such portion of said east half of lot nine as the said mortgagor has conveyed to the Wellington, Grey, and Bruce railway." This mortgage was forthwith registered upon the township

lot. On January 10th, 1876, Moore registered his plan of the village, having in the meantime made some alterations, owing to which a small lot, numbered 106, was obliterated by being converted into a portion of a street, and the number of the obliterated lot was transferred to the parsonage lot, and so marked thereon. In September, 1876, Moore applied to the plaintiff for a loan of \$600 upon lot 106, or the parsonage lot, and the plaintiff thereupon, through his solicitors, applied to the registrar of the North Riding of Wellington, for an abstract of registrations on the lot in question. The registrar prepared an abstract accordingly; but on reading the description in Buchanan's mortgage, showing that lots from 1 to 181 inclusive, according to a certain plan, were excepted, and on examining the plan filed in January, 1876, from which it appeared that the parsonage was lot 106, the registrar apparently concluded that this lot was unaffected by Buchanan's mortgage, and he did not insert it in the abstract. The mortgage was executed on "a part of the east half of lot No. 9, in the 9th concession of the township of Maryborough, in the county of Wellington, as described and laid down on a certain map or plan, containing a subdivision thereof, by M. C. Schofield, P. L. S., for the said Reverend George C. Moore, bearing date 1872, and known thereon as lot No. 106, or 'The Parsonage,' in the occupation of the said mortgagor, and bounded on the west by Robb street; on the south by William Wallace Moore street; on the east by Carson street; and on the north by four lots; and which block is supposed to measure at least 350 feet from north to south, by 200 feet from east to west; also lots Nos. 130 and 131, the east side of Carson street on said plan;" and the money was thereupon advanced. Interest having fallen into arrear, the plaintiff prepared to sell under his power, and finding the defendant King in occupation, brought the present action, to which Buchanan, as landlord, was subsequently made a party.

The learned Judge entered a verdict for defendants, on the ground that it was competent for Buchanan to take a

mortgage on the property described in accordance with a certain plan, although that plan might not have been registered, there being nothing in the registry laws to the contrary; and that, inasmuch as it was only the reservation or exception which was expressed in Buchanan's mortgage as being according to a certain plan, if there was anything faulty in the exception, the whole of the property mentioned in the first part of the description would pass.

May 20, 1879. *A. C. Galt*, obtained a rule *nisi* to set aside the verdict entered for the defendants and to enter a verdict for the plaintiff, upon the ground that the verdict was contrary to law and evidence and the weight of evidence, and upon leave reserved at the trial.

May 31, 1879. *J. K. Kerr*, Q. C., shewed cause, contending that the mortgage to Buchanan having been duly executed by Moore and registered on the township lot, before the plan of the village had been filed, an indefeasible title to the property, as described in the mortgage, passed to Buchanan; and there was no duty cast upon him to register the plan which had been given to him, nor to see that the mortgage was registered on a village lot, inasmuch as it was only the exception or reservation, and not the property granted, which was expressed to be "in accordance with" the plan in question.

Christopher Robinson, Q. C., and *Galt*, contra. It is quite clear that the real intention of the parties to the Buchanan mortgage was, to except out of it the entire village, as the property mentioned in the reservation includes all the village lots and streets in Moorefield, unless Buchanan is right in his contention as to the parsonage lot, which had no number marked upon it according to the map or plan given to him by Moore. The plaintiff did all that was possible for him to do in order to see that the parsonage lot was unincumbered when Moore applied to him for a loan. The registrar omitted to insert the Buchanan mortgage in the abstract which he furnished to the plaintiff, as the only registered plan filed with him shewed the parsonage

lot as being also lot 106. The question then is, as between these parties, all being in a moral point of view innocent, which must suffer. This will be answered by shewing that Buchanan was legally liable and bound to register his plan, the non-registration of which has caused the present difficulty. The Registry Act, R. S. O., ch. 111, sec. 82, and sub-sec. 1, provides that, "whenever any land or original town or township lot has been surveyed or subdivided into town or village lots, or other lots so differing from the manner in which such land or lot was surveyed or granted by the crown, that the same cannot or is not, by the description given of it, easily and plainly to be identified, the person, corporation, or company making such survey or sub-division, their heirs, executors, administrators, or assigns, agents, attorneys, or successors, shall within three months from the date of every such survey or sub-division, lodge with the registrar a plan or a map of the same on a scale," &c. Buchanan was therefore bound, as an assignee or agent of Moore, to register the plan which was handed to him by Moore, and thus prevent the difficulty which has taken place. The object of the Registry Laws has been to oblige parties dealing with real estate to register or file all documents necessary to enable the public to see the state of a title without going beyond the Registry office. The registrar himself may have been culpable in registering Buchanan's mortgage without first insisting upon having the plan alluded to filed. In any case, the blame lies between Buchanan and the registrar, and the plaintiff's title should prevail.

The following cases were cited: *Lawrie v. Rathbun*, 38 U. C. R. 255; *Arnold v. Robertson*, 8 C. P. 154; *Fraser v. Gladstone*, 11 C. P. 125; *Robinson and Joseph's Digest*, p. 3276, *et seq.*, R. S. O., ch. 111, secs. 55 to 60—74 to 82.

31st May, 1879. HAGARTY, C. J.—When the defendant's mortgage was executed a plan had been made, but not registered, but not specifically shewing this parsonage lot, either by that name or by any number; but other lots

shewn therein were numbered. The mortgage conveyed the 100 acres with certain named exceptions of numbered lots, according to a plan made by Schofield, differing from the registered plan, and not registered. By this plan the premises in contest are not excepted.

We cannot see how any subsequent alteration or registration of any plan by others than the defendant can affect his title; nor can we see that he was required to do any act in reference to any plan originally or subsequently registered.

We discharge the rule.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

HAYES V. UNION MUTUAL LIFE ASSURANCE COMPANY.

Insurance—Misstatement in claim papers—as to age of insured—Burden of proof—Voluntary admissions.

One H. effected an insurance on his life with defendants, a Life Assurance Company, and died. Plaintiff, his administratrix, in the proofs of death, stated the age of the insured as being two years more than his own representation of his age in the application. Defendants pleaded misrepresentation of age by the deceased, and relied on the claim papers as proving it. At the trial, plaintiff swore that she had no ground for stating the age as she did, except that she had been misled into making it by entries in an old book, being a record of his service in the army, in the possession of the insured at the time of his death, and that deceased had said that he was younger than the age in the record of service: *Held*, that plaintiff was not bound by the statement in the claim papers, but that she could on her own evidence explain it, and that the burden of proof was not so shifted as to compel her to shew the true age of the insured to be as stated in the application, but that defendants were bound to prove the alleged misrepresentation.

THIS was an action on a policy on the life of one John Hayes.

The only plea necessary to notice is the fifth, which set out that the application was the basis, &c., of the policy, and provided that if any statement made in the application, or the applicant's medical examiner's certificate, should be

found untrue in any respect, the policy should be void: that in reply to the question, "state the age next birthday, of the person whose life is to be insured," the said applicant, John Hayes, stated and answered "fifty-two years on 21st December, 1875," whereas his age at his next birthday was not fifty-two, but was past fifty-four years, and said answer was in fact untrue, whereby the policy was void.

Issue.

The cause was tried at the last Spring Assizes, at Ottawa, before Armour, J., and a jury.

The policy was dated the 8th May, 1875. It was admitted that it was in force at the time of the applicant's death. For the defence it was shewn that, in deceased's application, to the question as to place and date of birth it was answered: "Place, Ireland; date, December 21st, 1823; age next birthday, fifty-two years on 21st December, 1875." Hayes died in July, 1878, at Ottawa. The claim paper put in by the plaintiff was filled in by one O'Keefe, said, in the argument, to be the company's agent. A great number of printed matters in the company's forms were required to be answered. No. 8 was: "Place and date of birth of deceased." Answer—"Ardagh, County Limerick, Ireland, November 10th, 1821: from the record of the British Army, in which the deceased served a term of years as private soldier." The defendants relied for defence on this statement in the claim papers shewing that deceased had given in his time of birth as 21st December, 1823, when the claim stated 10th November, 1821.

The plaintiff was then called. She stated that she was the widow of the deceased: that she knew him in Quebec twenty-five years ago: that he was then a soldier: that she did not know his age: that she could not read or write: that it was a mistake on her part in giving in his age: that it was taken from the discharge book in the service: that before he was insured he told his comrades and witness that he was younger than the age he gave in the British service when he enlisted: that O'Keefe made out the papers for

witness: that the age was taken from the book: that he had never told witness his age or birthday: that he made himself out younger than he was to escape boy service: that the book was a record of his service in the army, given to him when he left. She produced the book. It was headed in print: "Book for old Soldier." "16th Regt. of Foot:—Account Book of John Hayes." It contained many printed pages of regulations, &c. On page 13, under head of soldier's name and description, is: "John Hayes enlisted for the 16th Regt. of Foot, on 27th February, 1841, at Limerick, in the County of Limerick, at the age of 19 years and 2 months; born in the parish of Ardagh, in or near the town of Newcastle, in the County of Limerick. Hair, Dk. Brown." Stitched to this book was another printed book when deceased appeared to have joined the Canadian Rifles, December, 1855.

The jury found a verdict for the plaintiff on the issues joined.

23rd May, 1879. *W. Mulock* obtained a rule *nisi* to set aside the verdict, or to enter a nonsuit or verdict for defendants, on the law, evidence, and weight of evidence; and for improper admission of evidence, in admitting statements alleged by plaintiff to have been made by the insured as to his age, and evidence contradicting the proofs of death; and for ruling that the statement of plaintiff as to the age of the insured, as contained in the proofs of death, was not *prima facie* evidence of the insured's real age, and that the burden of proof was on defendants to shew that his age was different from that stated in the application.

June 6th, 1879. *Bethune*, Q. C., shewed cause, citing *Bliss on Life Insurance*, sec. 265, on the effect of estoppel, and contending that it was a question for the jury whether the statement in the proof papers was false.

Mulock, contra. The defendants are entitled to rely on the proof claims, and the jury should have been told that plaintiff was bound affirmatively to prove the age of the

insured, or at least to account for any mistatement in the proof claims. *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. 509; *Campbell v. Charter Oak Fire and Marine Ins. Co.*, 10 Allen, 219.

28th June, 1879. HAGARTY, C. J.—There seems nothing in the contract entered into between these defendants and the deceased making it binding on his representatives, or those claiming benefit under the policy, to make any particular form of proof, or to answer any questions, or make any statements as to age of deceased beyond the requirement of “due and satisfactory proof of the death of the insured during the continuance and before the termination of this policy, and of the just claims of the assured, or of any other person as executor, administrator, guardian, or assign of the assured under it.”

These words are in the policy. In the declaration, accompanying application, the insured says, “Before demanding payment satisfactory proof of the death of the party whose life is hereby proposed to be insured, shall be furnished.”

It therefore appears that under the contract the plaintiff was not called upon to furnish any proof to the company except as to the death and the legal right of the person entitled to receive the insurance money.

All the elaborate list of questions and statements presented to her to be answered seems to be for the most part wholly beside the true matter to be legally enquired into.

She is asked as to her husband’s date and place of birth. They had already accepted his declaration and statement on that subject. We do not see why she can be called on to re-state it. She may have had no knowledge or information on the point, and might have declined answering, or averred her ignorance of it.

We may understand how the insurers may require her to be bound by statements which under the contract she is required to furnish, e. g., as to the cause and fact of death, and as to her personal right.

The cases chiefly relied on by defendants as to the con-

clusive effect of the statements in the proof papers, are *Campbell v. Charter Oak Co.*, 10 Allen, 213, and *Irving v. Excelsior Co.*, 1 Bosw. 507, in the Massachusetts and New York Courts respectively. But in *Mutual Benefit Life Ins. Co. v. Newton*, 5 Big. 580, Supreme Court, United States, these cases are noticed thus: "It is not necessary, however, to maintain any doctrine as strict as that in the present case, and possibly the rule there laid down is properly applicable only where the insurers have been prejudiced in their defence by relying upon the statements contained in the proofs. Be that as it may, all that we now hold is, that the preliminary proofs are admissible as *prima facie* evidence of the facts stated therein against the insured, and on behalf of the company." *Bliss on Insurance*, (ed. of 1874) p. 44, 34: "It seemed at one time to be held that the assured is bound by the statements contained in the proofs presented by him, unless before a trial he notifies the company of some error in them, and cannot otherwise be permitted to contradict them at the trial; but the current of recent decisions is to hold the contrary. The difference of decision upon this point is perhaps in some degree to be accounted for by the different language of the policies, while what is said in the earlier cases is to some extent *obiter*." A large number of American cases is cited.

No English authority directly bearing on this point has been cited to us.

We can see no reason for holding her concluded by the statement, voluntarily and not necessarily made by her, as to the age of the deceased. We think she has the clear right of explaining why and how she came to make that statement. She produces the book from whence she, or rather the agent who drew up the claim papers, got this information.

The issue to be tried was, that the defendants had made this contract with the deceased. Was it avoided by the falsehood of which they allege he was guilty in misstating his age?

The burden is on them. To escape from their contract on this ground they have to shew the allegation to be false.

It must be tried like any other question of disputed fact. They have to rely on the evidence obtained from her. She shews its origin.

The book, we may gather from her statements of the deceased's admission, was his discharge or account book given to him on his leaving his regiment. In that was found a statement of his enlistment and his age in 1841. There is no evidence of the manner in which that statement was obtained, or whether it was so entered from the deceased's own assertion, or from any other source. It is all conjecture. No proof was given of the custom in such cases.

It had all to be left to the jury; the solemn declaration of age made by the assured when effecting the policy, the statement of the present plaintiff, voluntarily made by her, her explanation of the reason of her making it, the book produced, and the deceased's statements respecting it, and the entry made as to his age at time of enlistment.

Without the aid of deceased's statement the book could hardly have been received in evidence. We cannot separate his admissions, by which it is sought to be verified and admitted in evidence, and his declarations accounting for a statement therein appearing.

To hold that the evidence at the trial rendered it incumbent on plaintiff to prove with certainty the true age would be possibly a denial of justice. We think the defendants have to prove their plea. The jury have decided against them. We see no misdirection, and we do not feel that we are bound to interfere. It is wholly a question of fact, proper for a jury's decision, and we think the parties ought to abide by it.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

OHLEMACHER V. BROWN.

Foreign judgment—Foreign discharge in bankruptcy—Evidence.

Plaintiff sued on a foreign judgment recovered against defendant, who pleaded never indebted, and never served with proceedings in the foreign Court. During the progress of the suit defendant obtained a discharge in bankruptcy in the District Court of the Northern District of Ohio, and at the trial obtained leave to plead this discharge as a plea *puis darrein continuance*, on which issue was taken. Defendant proved that such a discharge would release defendant from all his debts, provable against his estate, in the United States, including the debt to plaintiff. Plaintiff's only evidence in reply was that defendant resided in Canada for two years previous to the discharge, and that he (plaintiff) had no notice of defendant's bankruptcy in the United States, and he contended that, as the Bankruptcy Acts required the bankrupt to reside or carry on business in the State where he filed his petition, and the defendant resided in Canada, the Court in Ohio had no jurisdiction to grant a discharge, and that the one produced was therefore bad: *Held*, that the discharge was a bar to plaintiff's suit. *Held*, also, that it was not necessary for defendant to prove that all proper steps had been taken to obtain the discharge, but that the discharge itself was *primâ facie* evidence of this.

THE declaration was on a judgment recovered in the Court of Common Pleas, in Ottawa County, State of Ohio, one of the United States of America.

It is only necessary to notice a plea *puis darrein continuance* allowed by order of Proudfoot, V.C., to be pleaded in substitution for the pleas previously pleaded.

This plea was, that after the accruing of the plaintiff's claim on the 25th July, 1878, defendant, being liable to be adjudicated bankrupt, within the meaning of the statutes in force concerning bankrupts in said State of Ohio, and all things necessary in that behalf having happened and been done, and all times having elapsed necessary to entitle defendant to an order of discharge, the said Court (*sic*) afterwards, and after last pleading, &c., duly allowed and granted to defendant an order of discharge, whereby defendant was discharged from all debts and claims which, by the Act of Congress of the United States establishing a uniform system of bankruptcy throughout the United States, were made provable against the estate of defendant, and which existed on the 19th July, 1878, excepting such

debts, if any, as were excepted from the operation of a discharge in bankruptcy, and said discharge was still in full force, &c., and that the debt due plaintiff was provable against defendant's estate in said District Court of the United States for the Northern District of Ohio, and the same existed on 19th July, 1878, and was not excepted by the Act from a discharge, and that defendant was, by said order of discharge, released therefrom.

Plaintiff took issue upon this plea, and replied that said District Court had no jurisdiction to grant the discharge: that the discharge was obtained by fraud; and that when the proceedings were taken in bankruptcy, plaintiff was not, nor had he been since, notified of such proceedings, as required by the laws of the United States.

The trial took place at the last Spring Assizes at Sandwich, before Galt, J., without a jury.

The judgment declared on, was proved.

The defendant proved his plea of discharge by producing and proving a certificate in these words: "Whereas Lemuel S. Brown has been duly adjudged a bankrupt under the Act of Congress, establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the Court that said Lemuel S. Brown be forever discharged from all debts and claims, which by said Act are made provable against his estate, and which existed on the 19th day of July, 1878, on which day the petition for adjudication was filed by him, excepting such debts, if any, as and by said Act excepted from the operation of a discharge in bankruptcy."

This certificate was signed by the Judge of the District Court, and attested by the clerk thereof.

It was objected for the plaintiff that evidence should have been given by exemplification of the previous bankruptcy proceedings leading to that discharge.

The learned Judge considered he was concluded by the discharge, and a verdict was entered for the defendant.

May 22nd, 1879. *Clarke* obtained a rule *nisi* to enter a verdict for the plaintiff, or for a new trial, on the ground that there was no legal evidence of the discharge; and also, because it did not appear that defendant carried on business in Ohio during the six months previous to filing his petition in bankruptcy; or that the Court granting it had jurisdiction; or that the discharge applied to plaintiff's cause of action; and because the discharge was no bar to the action.

Caswell shewed cause. It being admitted that the original certificate of discharge obtained from the District Court of the Northern District of Ohio was as good evidence as an exemplification thereof, it is unnecessary to refer to that part of the rule. The defendant having produced a certificate of discharge in bankruptcy from a Court having full power to grant such a discharge, and the certificate reciting that the defendant had complied with all requirements of the law to obtain the same, defendant was not now bound to shew that he carried on business within six months prior to the discharge in Ohio, or that proper notices to the creditors were given by the Marshal of the Court. It is to be presumed that all proper notices were given by the Marshal of the Court, and that the Court proceeded regularly according to jurisdiction, till the contrary appears: *Lathrop v. Stuart*, 5 McLean 167. If the notice required by the statute has been duly published, and here it must be presumed it was, the discharge will bar the debtor, although the name of the creditor was not placed on the schedule or any notice given to him: *Symonds v. Barnes*, 59 Me. 191, and other similar cases on page 780 of *Bump on Bankruptcy*.

J. B. Clarke, contra.

June 28, 1879. HAGARTY, C. J.—At the trial an American lawyer was examined. He swore that he was familiar with the United States Bankruptcy Laws, and that the certificate produced would bar these judgments proved by plaintiff. He proved the signature of the Judge, and that

he was a Judge; and that this certificate would be admitted in the American Courts to prove a discharge: that the production of a certificate of discharge is conclusive evidence of the regularity of the discharge: that it was not necessary the bankrupt should be a citizen. If he had carried on business for six months previous to filing his petition it is sufficient. The debtor files a schedule of his creditors with the petition, and notice is sent to each by the Marshal. Notice of filing of petition is published three weeks. The next important step is the adjudication. It is not necessary that specific notice should be given to each creditor; notice must be given to those whose names are mentioned, but if there are any others the Marshal's publication is sufficient.

If the bankrupt fraudulently omitted to insert a creditor's name, the latter would be bound by the discharge, but he may apply within two years to the Court to set it aside. A creditor, whether he has received notice or not, is bound by the discharge, if his debt be provable; but he can apply to set it aside if his name be omitted, or any fraud practised upon him.

In reply, plaintiff swore that he resided at Sandusky, Ohio, that he never received any notice from defendant, or any body, of any bankruptcy proceedings, and never saw any notice thereof: that defendant resided in Middle Island, in Canada, for a year previous to July, 1878. He lived at Put-in-Bay, (U. S.) up to the fall of 1876, when he moved to Middle Island: that he saw defendant for the last time at Sandusky, in December last, or November, and then first heard of his discharge.

The expert, being recalled, stated that it was necessary that a petitioner should have carried on business in the district in which his petition is filed for six months next preceding the filing his petition, if he is not a resident of the district, whether he is an American citizen or not.

We were referred to *Symonds v. Barnes*, 59 Maine, 191. The Court say, (after noticing the Bankrupt Act of 1867,) "The defendant pleads a discharge. It is in due form of

law. 'An order of discharge will be sufficient evidence of bankruptcy, and of the validity of the proceedings therein,' citing *Robson on Bankruptcy*, 458. The order proves itself, 1 Deacon, 800."

The omission of a creditor's name, unless fraudulent, does not prevent his being barred: *Lathrop v. Stuart*, 5 McLean, 167. The Court say: "It is a principle long since settled that in pleading the judgment or decree of a Court having plenary jurisdiction of the subject, it is not necessary to set forth the proceedings." It was held that a discharge being averred, the Court will presume all necessary steps were taken.

It seems clearly proved here that in the United States the proof of this certificate is sufficient without further evidence of preliminary or other proceedings.

In the 7th ed. of *Taylor on Evidence*, sec. 1534, after stating that plaintiff stating a foreign judgment need not state in his declaration that the Court had jurisdiction, or that the proceedings had been properly conducted, are these words, "It seems, however, to be still necessary for a defendant to state these particulars when he pleads such judgment by way of estoppel or justification;" citing *Collet v. Lord Keith*, 2 East, 260; *General Navigation Co. v. Guillon*, 11 M. & W. 877; *Ricardo v. Garcias*, 12 C. & F. 377.

If the plaintiff contended that the plea of discharge should have averred the previous proceedings, he should have demurred. He has merely taken issue upon it.

Then, as to the sufficiency of proof. It is proved very clearly that the certificate produced would be held sufficient evidence of the *primâ facie* sufficiency of all the previous proceedings in the Courts of the United States.

If it be urged that the proof required in our Courts is necessary, it can be answered that with us the discharge would also be considered, *primâ facie* at least, sufficient, and that it would be thrown upon the plaintiff to answer it by some matter replied to the plea setting it up.

In England a defendant is allowed to plead his discharge generally, and give the special matter in evidence. See

the statute law in *Bullen & Leake*, 437 *et seq.*, both when discharge is before and after action brought.

We do not appear to have any such statutable provision here, but the practice seems to have been to have pleaded the discharge without setting out the preliminary proceedings.

At all events we may hold the proof here offered as sufficient on the issues raised on the plea.

Here we have an action on an American judgment, and an adjudication of discharge duly proved as valid and effectual by American law, and even if the evidence at the trial must be judged according to the *lex fori*, I think it was sufficient on the issues raised.

The evidence of plaintiff, as to defendant residing at Middle Island, is not sufficient to avoid the discharge. The cause of action appears to have been a promissory note made at Put-in-Bay, in the United States, and the evidence shewed that a carrying on business for six months in the United States would be sufficient, whether the debtor was or was not a citizen.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

PICKEN, ASSIGNEE OF MORRISON, v. THE VICTORIA
RAILWAY COMPANY.

Interpleader—Attaching orders—Adverse claims.

In an action brought by an assignee in insolvency on a debt admitted to be due to the insolvent, defendants applied for a stay of proceedings and for an interpleader to try the rights of the assignee as against various creditors of the insolvent, who had had served attaching orders and garnishing summonses prior to the insolvency: *Held*, that the defendants should have had the garnishment proceedings disposed of in the Courts in which they had been taken, instead of making this application, which was therefore refused.

The assignee having given no assistance to the Court by affidavit, and having made no attempt to adjust the claims, was refused his costs.

ON the 14th March, 1879, the defendants obtained a summons in Chambers calling on the plaintiff, John Pearce, Simeon St. Michel, Robert Cain, John Dobson, Alfred Might, R. J. Tackaberry, E. J. Jocelin, William Needler, Thomas Sadleir, Alexander Niven, to appear and state the nature and particulars of their respective claims to the subject matter of this suit, and maintain or relinquish the same, and for a stay of all proceedings herein as against the defendants, and a trial of all necessary issues, &c.

The application was referred to the full Court.

The following facts appeared:—

About the 1st November, 1878, defendants admitted they owed one Morrison \$699.63. He made an assignment in insolvency on the 3rd December, 1878. On the 20th February, 1879, this action was commenced. On the 15th November, 1878, an attaching order and summons was served on the defendants to garnish the amount due to Morrison at the suit of Simeon St. Michel, a judgment creditor in the County Court, for \$218. On the 21st November a garnishment summons was served from the Division Court at the suit of Robert Cain, primary creditor, against Morrison, for \$53.82. Some time before the 1st December a like summons was served from the Division Court at the suit of Dobson, primary creditor, against Morrison, for \$41.72. About the same time another of a like nature was

served from the Division Court in the case of *Wright v. Morrison*, for \$80.19.

On the 15th November, a like summons, *Tackaberry & Jocelin v. Morrison*, from the Division Court, for \$86.90, was served. On the same day another summons was served from the Division Court by the same parties against Morrison, for \$84.

On the 9th November, defendants were served with notice of an assignment made by Morrison to Needler and Sadleir for \$145.56, of part of Morrison's moneys in the defendants hands.

On the 1st December defendants were served with notice from John Pearce, claiming that two sums of \$89.86 and \$26.35, making \$116.21, part of the moneys due by them to Morrison, and which two items were originally due by them to one William Dawley, and by him assigned to Morrison, Dawley had assigned to him.

On the 29th October Pearce, in his affidavit, stated that it was true Dawley had on the 26th October (three days before) given an order therefor to Morrison, but that this was obtained by force or fraud. Morrison, in an affidavit filed, wholly denied this, and swore it was given fairly and for value to him.

Morrison, in his affidavit, swore that he gave Needler and Sadleir on the 17th October an order, in these words: "Pay to Needler and Sadleir the amount of their account against me up to 1st of November, on pay-day in November:" that at that date his account with Needler and Sadleir was not stated or settled, and goods were subsequently supplied by them to him: that the order was not intended to be absolute, but only as a security for his debt, which would accrue between 17th October and the 1st November, to become absolute, when this account to the 1st November would be rendered and the amount settled between them: that he had applied to them for particulars of their account, and they had refused to give it, and that defendants had no authority from him to state or settle his account with Needler and Sadleir.

The last claim was made by one Niven several weeks after the assignment in insolvency, claiming that about \$100 of these moneys were trust moneys.

May 26, 1879. *Aylesworth*, for the plaintiff, shewed cause.

The case is not within the language of the statute, R. S. O., ch. 54, sec. 2. These defendants are in no different position from any defendant who owes an unascertained balance. The only sense in which defendants can be said to have "no interest in the subject matter of the suit" is, that they may have set apart so much of their funds as that which they will pay to satisfy this debt. The money is not legally or properly in Court at all. It is paid in under a verbal direction of a judge, not under any plea. Defendants are shewn to have agreed, prior to Morrison's insolvency, to pay the claim of *Needler and Sadleir*, two of the claimants, and are thereby under the authorities precluded from interpleading, even if it were a case within the meaning of the Act. If the defendants have any defence on the facts of the case, they should plead it, and the action should be allowed to go on.

Mulock, Ritchie, Holman, and Bull, contra.

The following cases were referred to: *Victoria Mutual Ins. Co. v. Bethune*, 1 App. R. 398; *Johnson v. Shaw*, 4 M. & G. 916; *Regan v. Serle*, 9 Dowl. 193; *Henderson v. Watson*, 23 Gr. 355; *Davis v. Douglass*, 12 Gr. 181; *McNaughton v. Webster*, 6 U. C. L. J. 17; *Cotton et al. v. Cameron et al.*, 2 Pr. Rs. 62; *Kerr et al. v. Fullarton et al.*, 3 Pr. Rs. 19; *Brill v. Grand Trunk R. W. Co.*, 20 C. P. 9; *Patorni v. Campbell*, 12 M. & W. 277; *Candy v. Maugham*, 1 D. & L. 745; R. S. O. ch. 50, sec. 313.

June 28, 1879. HAGARTY, C. J.—Niven's claim need not be considered.

Then it stands thus. In *Simcon St. Michel's* case, an

attaching order has been obtained and served by a judgment creditor within the 30 days.

In five other cases attaching orders have been obtained and served within the thirty days by primary creditors of Morrison, who have never obtained judgment against him or on their claims.

Now, as to all these claims, it appears to me that there is no ground for our interference. They should all be finally disposed of, the one in the County Court, the others in the Division Court.

The present defendants, the garnishees, could have applied long ago, and can apply now to the Judge to have the attaching order rescinded or finally disposed of under the Division Courts Act; the fullest powers are given to the Judge to dispose of such matters. Sections 142, 144, R. S. O. ch. 47, and others, seem to give almost unlimited powers to deal with such cases as those before us.

The assignee in insolvency can be heard, or any person claiming by any assignment. As to the attaching order by the execution creditor, that can also be heard and adjudicated.

The late Chief Justice Draper, in *McNaughton v. Webster*, 6 U. C. L. J. 17, points how that could be and ought to be done. In *Sieveling v. Behrens*, 2 M. & C. 591, Lord Cottenham states very instructively the principles that ought to govern in these applications. A bill of interpleader was filed making several persons defendants who were proceeding in the Mayor's Court against a creditor of plaintiff who had become bankrupt, and seeking to attach moneys of his in plaintiff's hand. "The ground on which I do proceed is, that until the rights of the attaching creditors shall have been ascertained nothing can be decided with respect to the property; because if, by the custom, one of the parties has acquired a right to the property, this Court cannot interfere with that right. This can only be ascertained in the Lord Mayor's Court; and all the parties litigant are parties to the proceedings there. * * I propose, then, that all the parties should have

liberty to take all such proceedings in the Mayor's Court as they may be advised."

He had all the parties before him as defendants in the bill filed, and he continued the injunction to stay execution, adding that he did not at all interfere with the parties' rights in the Mayor's Court.

Lord Cottenham also says, at p. 591: "The proceeding by interpleader, although very necessary for the protection of a party upon whom two inconsistent claims are made, is undoubtedly in many cases a severe proceeding against the person who is in fact entitled. He is in the course of establishing his legal right, and recovering a debt or duty due to him, when this Court intervenes and deprives him of the means of establishing that legal right, because some other person, who appears ultimately to have no title at all, gives this Court jurisdiction by way of interpleader, by setting up a claim. I think it would not be expedient to lay down any rule, or adopt any practice by which persons entitled to an interpleader would be much encouraged to come here."

A great number of authorities are cited and referred to in our Court of Appeal in *Victoria Insurance Co. v. Bethune et al.*, 1 App. R. 398. The principles laid down by the majority of the Court seem to me to support the contention that we cannot interfere. I refer especially to the judgment of Moss, C. J.

As to the remaining claims, that of Pearce and that of Messrs. Needler & Sadlier, I do not think, from anything that appears in the affidavits, we should be warranted in interfering, even if we were clear that we have the right so to do.

I think we may very safely leave the defendants to act on the advice of their counsel as to these claims, and we do not think it would be right, even if practicable, to attempt to frame an interpleader issue to meet the case.

We do not wish to express any opinion on the very meagre statement of facts laid before us as to these claims,

but we would feel much surprised if on investigation they will be found attended with difficulty.

It ought to be a very easy matter for the defendants, on amicable negotiations with the plaintiff, as representing Morrison's estate, to decide as to the validity of these two claims.

We decline to make any order as to interpleader. We may, under the circumstances, venture to direct all proceedings in this cause at the suit of the plaintiff to be stayed, as against the defendants, for the space of two months, to enable steps being taken to have the various garnishment proceedings disposed of.

The plaintiff has given us no assistance whatever by affidavit in this matter. We cannot give him any costs.

It was just the case in which an assignee, anxious in good faith to protect the assets of the estate, might have at least attempted to have made some amicable arrangement with the railway company by which these outstanding claims might have been easily disposed of without any costly legal proceedings.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged, without costs.

GRAHAM V. CROZIER.

Libel—Privileged communication—Excess.

Defendant wrote to R., who was M.P. for the county in which the parties resided, requesting him to have plaintiff, a postmaster, removed from office, as his "roguery" was unbearable in the locality, and stating that he (defendant) could not trust his bank-book through the post office lest plaintiff should go to the bank and draw or keep the money : that he had sent a declaration to the P. O. Department at Ottawa to have him removed ; and demanding to know what the country would "turn to" if the Government kept such men in office ; and that if the people could not send their money through the post office they had better rise in rebellion at once. Defendant then wound up his letter with a demand upon R., as their representative, to have the "scoundrel removed" : that he had "broken up 7 or 8 money letters and used the money for his own purpose" :

Held, that the Judge at the trial had rightly ruled that the occasion of writing the letter was not privileged ; and that on the authority of *Fryer v. Kinnersley*, 15 C. B. N. S. 430, the violence of the language was so much in excess of the occasion as to exclude it from the rule as to privileged communications.

LIBEL.

Pleas : Not guilty, and justification.

Issue.

The trial took place at the last Spring Assizes, at Cobourg, before Morrison, J., and a jury.

The facts were as follow : Plaintiff had been a postmaster, and defendant addressed the following letter to one Ross, member of the Dominion Parliament for that section of the country :

"Bethany, September, 15th, 1877.

Lewis Ross, M. P., Port Hope.

Sir:—Please take notice and have William M. Graham, Post Master, removed from that office, as his roguery we are not able to bear in this locality. Sir—I do my business with the Ontario Bank, Peterboro. I had to travel forty miles to Peterboro' and back. I could not trust my bank book through the Post Office for fear he would go to the bank and draw or keep the money. I send a declaration to the P. O. Department at Ottawa, to have him removed. Are we in this locality to be put about in such a manner ? If our government will keep such men in office, what will our country turn to ? If people cannot send money through

the Post Office, we had better rise in rebellion all at once. Sir—I demand you, as our representative in parliament, to have the scoundrel removed. He has broken up 7 or 8 money letters and used the money for his own purpose. Some parties had a writ served on them after two or three months. Sir—I hope you will be so condescending as to let me know by return of mail. I remain yours.

JAMES CROZIER.”

It was contended that this letter was privileged, but the learned Judge held that it was not. The parties went to the jury on the justification, when a verdict was found for the plaintiff, with \$800 damages.

May 21st, 1879. *McMichael*, Q. C., obtained a rule *nisi* to enter a nonsuit, because the letter complained of was a privileged communication; or for a new trial, on the law and evidence, and that no damages could be given for the alleged malice, the question whether there was any malice to deprive defendant of his privilege, not having been left to the jury.

June 3rd. 1879. *J. K. Kerr*, Q. C., shewed cause. This was not a privileged communication. It is distinguishable from *Harrison v. Bush*, 5 E. & B. 344.

[The Chief Justice referred to *Clark v. Molyneux*, L. R. 3 Q. B., D., 239.]

The following cases were also cited: *Dickson v. Earl of Wilton*, 1 F. & F. 419; *Holliday v. The Ontario Farmers' Mutual Insurance Co.*, 1 App. R. 483; *Starkie* Libel, 461, 462; *Fancitt v. Booth*, 31 U. C. R. 265; *Simpson v. Robinson*, 12 Q. B. 513; *Hibbs v. Wilkinson*, 1 F. & F. 610.

McMichael, Q. C., contra. The main question is, was the letter privileged? There is no doubt it was. For the distinction, see *Blackham v. Pugh*, 2 C. B. 611. Because there has been an improper use of words is no reason for holding that the communication is not privileged: *Tench v. Swinyard*, 29 U. C. R. 319. See, also, *Usill v. Hales*, L. R. 3 C. P. 319; *Spill v. Maule*, L. R. 4 Ex. 232; *Layman v. Latimer*, L. R. 3 Ex., D., 352; *Williamson v. Freer*, L. R. 9 C. P. 393.

28th June, 1879. HAGARTY, C. J.—In Starkie, 3rd ed., at p. 268, it is said: "As on the one hand it would be contrary to common convenience to fetter mankind in their ordinary communications by the apprehension of vexatious litigation; so, on the other, would it be highly mischievous to allow men to inflict the most cruel injuries to reputation and character with impunity, under the cloak and pretence of discharging some duty to themselves or to society, when they were in fact actuated by the most malicious intentions."

In *Dickson v. Lord Wilton*, 1 F. & F. 419, one of the counts charged words spoken to a member of Parliament. It appeared that plaintiff (lieutenant-colonel of a regiment) had been displaced from his command. The defendant was his colonel, and had lodged complaints against him. Mr. Duncombe put a notice on the paper in the House of Commons to ask a question on the subject, and defendant called on him to explain the matter before the day on which the question was to be asked; and then occurred the conversation, in the course of which the words charged were spoken.

Lord Campbell said: "With respect to the conversation, I say again the law will justify anything which the defendant might *bonâ fide* say to Mr. Duncombe, as a member of the House of Commons, for his information as such member. If Lord Wilton went to Mr. Duncombe, and spoke the words *bonâ fide*, and with the view to put him in possession of the real facts of the case, he is protected and entitled to his verdict on that count; but if his object was to prejudice Mr. Duncombe against the plaintiff, and he had the indirect purpose of preventing him from putting his question in the House of Commons, he was not protected, but you ought to find a verdict for the plaintiff."

He also says: "Whether or not the occasion gives that privilege, is a question of law for the Judge; but whether the party has fairly and properly conducted himself in the exercise of it, is a question for the jury."

In *Gould v. Hulme*, 3 C. & P. 625, Tindal, C. J., held a

letter written to the Judge in Bankruptcy by a creditor opposing his discharge on the ground of fraud, &c., was not a privileged communication, the proceeding being an improper one, &c.

In *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 504, the well known rule is repeated: "A communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without that privilege, would be defamatory and actionable."

In *Henwood v. Harrison*, L. R. 7 C. P. 623, Willes, J., says: "It is clear that the privilege established in respect of duty or interest, however necessary and valuable, must be exercised within the limits which the interest or duty indicates, and that in many of the instances of privileges to which reference has been made, a public statement to an individual, not having any interest in the matter, might be held libellous. The statement must be such as the occasion warrants, and made to a person who is interested in receiving it."

In *Harrison v. Bush*, 5 E. & B., 344, the judgment of Lord Campbell is very full on the subject of the privilege accorded to *bonâ fide* complaints for redress, even if addressed by mistake to the wrong quarter, as to the Secretary of State, instead of the Keeper of the Great Seal: "The alleged misconduct of any who are clothed with public authority, may be brought to the notice of those who have power and the duty to enquire into it, and to take steps which may prevent the repetition of it." * * "But we find in the books various instances in which privilege has been allowed to criminatory publications, although those to whom they were addressed had no direct authority in respect of the matter complained of, and shewing that this is not the proper criterion to determine whether the complaint is made to a competent tribunal." *Fairman v. Ives*,

5 B. & Ald. 642, is cited, where Abbott, C. J., says that a letter to the Secretary at War, asking him to make a military officer pay a debt, was privileged, though the Secretary had no such power, adding, "It was a good answer for defendant to shew that the paper was addressed to the Secretary of War, *bonâ fide*, for the purpose of obtaining redress, and not for the purpose of slandering the plaintiff."

In *Fryer v. Kinnersley*, 15 C. B. N. S. 430, (1863) Sir William Erle, noticing a difference of opinion as to whether the communication was privileged, adds that, whatever might be their opinion, in that the defendant could not take advantage of it, because the letter in their opinion goes far beyond the occasion, "the calling the plaintiff 'a raving madman,' and some other expressions, are so much in excess of the occasion as to prevent our holding the letter to fall within the rule as to privileged communications. Without therefore further expressing any opinion, we think the rule must be discharged. The verdict for the plaintiff will consequently stand."

In *Clark v. Molyneux*, L. R. 3 Q. B. Div. 246, Brett, L. J., says: "If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive."

A large number of the authorities are reviewed in *Holliday v. Farmers' Mutual Assurance Co.*, 1 App. Rep. 483.

I have arrived at the conclusion that the learned Judge was right in holding that the libel in the case before us was not privileged. It is taken out of the class of cases rested on the doctrine of an honest mistake as to the proper quarter in which to seek redress for alleged misconduct, by the statement contained in it that the defendant

had already applied, or was applying, to the Post Office Department at Ottawa to have plaintiff removed from his office of postmaster. I think it impossible to hold that because it is addressed to Mr. Ross, as the local member of Parliament, it is therefore privileged.

It in no way professes to refer to any existing parliamentary inquiry or proceeding. Calling on Mr. Ross as his representative in Parliament to have "the scoundrel removed," and charging plaintiff in the most violent and intemperate language with crime, cannot, in my judgment, be tortured, by any liberality of concession to free discussion, into a privileged communication.

The defendant shews that he knew the proper quarter to apply to. He has no right, I think, to send a furious charge of crime to the local or any other member of Parliament. On the same principle he could call upon every representative to do what he asks Mr. Ross to do. There is no trace, that I can find, of any authority going that length. In the case noticed, of *Dickson v. Lord Wilton*, a question was to be put in Parliament, and the defendant waited on the member who was to put it, and to him used the words complained of. This was held privileged, so far as the words were used in good faith to put the member in possession of the real facts of the case. But how would it have been if the defendant had voluntarily, and without any question pending, have addressed either this member, Mr. Duncombe, or all or any other of the six hundred and odd members of the Commons, with a violently worded attack on the plaintiff?

I think we should establish a most vicious precedent if we were to hold such a document as that before us privileged, by the fact of its being addressed to a member of Parliament, the writer having already stated his complaint to the proper authority.

I can understand a case in which, all redress being refused or unreasonably delayed by the authorities, a person having an interest applies in good faith to his representative in Parliament to ask a question as to the delay, or to bring the matter before Parliament.

Nothing of the kind is suggested here.

I think the privilege claimed was properly denied. Even if we had doubts as to the occasion being privileged, we may turn to Sir William Erle's view, that the language is so much in excess of the occasion, that we ought not to hold it as falling within the rule of privilege.

ARMOUR, J., concurred.

CAMERON, J., took no part in the judgment, having been concerned in the case at the bar.

Rule discharged.

REGINA V. CLARKE.

Conviction for selling liquor without license—Appeal to Judge without jury in lieu of to Sessions—R. S. O. ch. 75, ch. 181, secs. 51, 71—40 Vic. ch. 27, D.—Mandamus.

Defendant was convicted for selling liquor without license under R. S. O. ch. 181, sec. 51, and appealed to the Sessions, which dismissed the appeal, on the ground that under sec. 71, it should have been made to the County Judge in Chambers, without a jury :

Held, refusing an application for a *mandamus* to the Sessions to try the appeal, on the ground that sec. 71, R. S. O., ch 181, was *ultra vires* the Ontario Legislature, that R. S. O. ch. 75, and ch. 181, sec. 71, constituted the County Judge, sitting in Chambers without a jury, a Court of Appeal in such cases, within the meaning of 40 Vic. ch. 27, D.

23rd May, 1879. *Blackstock* obtained a rule *nisi* calling upon Kenneth McKenzie, Esq., Chairman of the General Sessions of the Peace for the county of York, and John Wilson, prosecutor, to shew cause why a *Mandamus* should not issue to the said Sessions, or to the Chairman of the said Sessions, to proceed with the hearing of an appeal by Edward Clarke against a conviction of said Clarke, by the Police Magistrate for the city of Toronto, for having, on the 31st March last, sold liquor without license, on the ground that said Clarke was entitled to have said appeal tried, and said chairman was wrong in dismissing the same, notwithstanding sec. 71, ch. 181, R. S. O.

The facts were as follow :

The defendant was convicted on the 8th May, 1878, before the Police Magistrate for the city of Toronto, of having sold liquor at Toronto, without license, and fined \$40 and costs. Against this conviction he appealed to the General Sessions of the Peace, but the Chairman of the Sessions, on 10th September, 1878, dismissed the appeal, with costs, on the ground that the appeal ought to have been made to the County Judge in Chambers without a jury, and not to the Sessions, pursuant to Rev. Stats. Ont., ch. 181, sec. 71.

On February 5th, 1879, *Fenton* (for the prosecutor at the Police Court) shewed cause. The Chairman of the Sessions

was right in dismissing the appeal, because it did not lie to the Sessions, but to the County Judge, sitting in Chambers, without a jury, under R. S. O. ch. 171, sec. 71, and ch. 75, sec. 2. The provision of ch. 181, sec. 71, providing for appeal to a Judge in Chambers instead of to the Sessions before a jury, is not *ultra vires*; but if it be, it is ratified and enforced by the Dominion Statute 40 Vic. ch. 77. Whilst a *certiorari* lies, unless expressly taken away by statute, an appeal from a summary conviction does not lie unless expressly given by statute: Per Abbott, C. J., in *Regina v. Harrison*, 4 B. & Ald. 519; *Paley* on Convictions, 340. The general Dominion law as to appeals, 32 & 33 Vic. ch. 31, sec. 65, as amended by 33 Vic. ch. 27, is confined to offences and matters "over which the Parliament of Canada have jurisdiction": 32 & 33 Vic. ch. 31, sec. 1. This law, therefore, provides no appeal in the present case, which is for an offence within the legislative authority of the Province of Ontario, and the appeal exists only under R. S. O. ch. 75, sec. 2, or ch. 181, sec. 71, or not at all. *Regina v. Boardman*, 30 U. C. R. 553, shews that the present case is within the powers of the Local Legislature, and although this decision has been shaken by the late cases of *Regina v. Roddy*, 41 U. C. R. 291, and *Regina v. Lawrence*, 43 U. C. R. 164, it has not been overruled. At any rate, the Dominion Act, 40 Vic. ch. 77, removes any doubt that may have existed as to the power of Provincial Legislatures to prescribe the procedure in appeals respecting offences within their legislative authority.

Blackstock, contra. This is a criminal offence. To sell liquor on Sunday was held to be a criminal offence in *Regina v. Roddy*, 41 U. C. R. 291, and the reasoning adopted there is equally applicable here. To say whether an appeal shall lie or not, and to what Court it shall lie, are matters of procedure; and in criminal matters the Dominion Parliament has, by the B. N. A. Act, sec. 91, sub-sec. 27, exclusive jurisdiction. Section 71, therefore, of the Liquor License Act, R. S. O. ch. 181, is clearly *ultra vires*, both in taking away the right to an appeal to the

General Sessions and in directing an appeal to another Court, *i. e.* the Judge of the County Court sitting in Chambers. The Dominion Parliament has never taken away the right to an appeal in these cases. Before Confederation the right to an appeal existed under Consol. Stat. U. C. ch. 114, sec. 5, and Dominion Statute 32 & 33 Vic. ch. 31, sec. 65, as amended by 33 Vic. ch. 27, and again by 40 Vic. ch. 27, does not take away this right, as is contended by the prosecution. The words in that Act, "Unless it be otherwise provided in any special Act under which a conviction takes place, an appeal shall lie," cannot be construed to refer to an Act of the Local Legislature, because no Local Legislature would have jurisdiction to say that an appeal should not lie, and it must not be supposed that the Dominion Parliament contemplated the Local Legislature enacting that which it had no jurisdiction to enact. Further, it would amount to a delegation to the Local Legislature of the powers conferred on the Dominion Parliament by the B. N. A. Act for the Dominion Parliament to ratify *a priori* an Act to be framed by a Local Legislature, though *ultra vires* its powers; and this the Dominion Parliament, according to the maxim, "*Delegata potestas non delegari potest*," would have no right to do, and "we must not intend that the Parliament assumed to do what it had no power to do": *Regina v. Roddy*, 41 U. C. R. 296. Besides, these words originally stood in parenthesis in the Summary Conviction Act of 1869, and it would be absurd to suppose that the Parliament intended, by a clause in parenthesis, to ratify all illegal Acts passed, or to be passed, by a Local Legislature. Nor should the words in that Act, "Unless some other Court of Appeal *having jurisdiction in the premises* is provided by an *Act of the Legislature of the Province*, in which such conviction takes place," be construed to mean that in any particular criminal matter the Local Legislature may constitute a particular Court of Appeal for that offence different from the Courts mentioned in the Summary Conviction Act, sec. 65. By the British North

Act, sec. 90, sub-sec. 14, the constitution of the Criminal Courts is within the exclusive jurisdiction of the Local Legislatures. These Criminal Courts the Local Legislatures have already constituted, and all the words quoted mean is that if the Local Legislature shall constitute other Criminal Courts in their stead, then these appeals shall lie to the new Courts; and not that the Local Legislature may single out a particular offence, and say that in such a case they constitute a new Court of Appeal for that offence, for that would be to legislate as to procedure, which the Local Legislature would have no jurisdiction to do. But if it be held that the Local Legislature may constitute a Court for a *particular* offence under this clause, that Court must still be one *having jurisdiction in the premises*, which means that the Court must have jurisdiction to entertain and try the appeal according to the forms provided by the Summary Conviction Act, sec. 66 of which empowers the Court to empanel a jury to try the facts; but the Court constituted by sec. 71 of the Liquor Act has no such power, and therefore has not jurisdiction in the premises.

June 28, 1878. HAGARTY, C. J.—Section 71 allows an appeal from a conviction on this 51st section to the Judge of the County Court, sitting in Chambers, without a jury, on giving certain notice and recognizance. Sub-section 5 directs that the practice and procedure on such appeal shall be governed by ch. 75 of the Revised Statutes, regulating procedure on appeals to the County Judge from summary convictions.

Section 75 directs that where no forms are provided in the schedule new forms may be framed according to those appended to the Dominion Act of 1869, 32-33 Vic. ch. 31, or the R. S. O. ch. 75.

This revised Act, ch. 75, sec. 2, directs that where any Act gives an appeal to the County Judge, without a jury, &c., such appeal shall be to the Judge of the County Court of the county in which the conviction is made, sitting in Chambers.

Section 13 authorizes the Judge to hear and determine the charge or complaint on the merits.

Section 15: No conviction affirmed or amended by the Judge shall be removed by *certiorari* to the Supreme Court.

Section 17: In proceedings under the Act the County Judge shall have all the powers which belong to or might be exercised by him in the County Court.

Dominion Act, 40 Vict. ch. 27, (passed 28th April, 1877,) declares that it is expedient to amend the law with reference to appeals from convictions before and orders by justices of the peace.

It then repeals section 65 of the Act of 1869, 32-33 Vict. ch. 31, and substitutes a new section therefor.

Unless it be otherwise provided in any Special Act under which a conviction takes place, or an order is made by a justice or justices of the peace, *or unless some other Court of Appeal, having jurisdiction in the premises, is provided by an Act of the Legislature of the Province within which such conviction takes place*, appeal is given in Ontario to the Court of General Sessions of the Peace. Then, "In case some other Court of Appeal be provided in any Province as aforesaid, the appeal shall be to such Court."

Section 3: "Whenever in the Act, 32 & 33 Vict. ch. 31, any duty in relation to an appeal is imposed on any officer by the term 'clerk of the peace,' said term shall include the proper officer of the Court having jurisdiction in appeal under the said Act, and the Acts amending the same, including this Act."

It appears to me that this Dominion Act removes all doubt as to the appeal being regulated by the Ontario Acts cited, and that it must be only to the County Judge without a jury.

I think between the 71st section of the Revised Statutes, ch. 181, and ch. 75 of the same Acts, there is a complete and sufficient establishment of a Court of Appeal under the Ontario Acts fully answering the requirements of the Dominion Act of 1877, ch. 27, and that there is to all intents and purposes a Court of Appeal provided by the

Legislature of the Province. I observe that the Dominion Act was passed only a month after the Local Act, and, as I should have thought, expressly to confirm its provisions as to appeal.

The intention of both Legislatures is to me transparently clear, and, for my part, I should much regret that any technicality should defeat such intention.

We are asked for a *Mandamus* to the Court of General Sessions to hear defendant's appeal. I think the application fails.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

RE HUBBARD V. THE UNION FIRE INSURANCE COMPANY (a).

Arbitration—Presence of parties—Invalidity of award.

H. insured stock of teas, &c., and having sustained loss by fire the matter was referred to L. and C., and a third person to be appointed by them, the appraisement and estimate of the loss by them or any two of them to be binding. L. and C. appointed M. third arbitrator. After the close of the evidence and several meetings by the arbitrators, M. having drawn the document set out below, produced it at a meeting of the arbitrators, and read it as his finding. At the next meeting a document formally drawn up by the company's solicitor was produced and signed by M.; but for some reason it was abandoned. At this meeting the arbitrators permitted the manager and inspector of the company to be present and take part in the discussion as to the amount of the award and the fixing of the costs. L. and M. agreed on the amount, but C. said he would not sign such award, and an appointment was then made for the next day, C. being present, to meet and sign it. The award was accordingly made on the following day by L. and M., C. not attending:

Held, that under the circumstances C.'s absence formed no objection.

Held, also, that permitting the officers of the company to be present and take part in the deliberations of the arbitrators was such improper conduct as to render the award bad.

Held, also, that the document, written and signed by M. and expressed throughout in the first person as his decision alone, without anything contained therein shewing it to be the decision of L. also, although signed by L., could not be upheld as the award of two arbitrators.

23 May, 1879. *Clendenan* obtained a rule *nisi* to set aside the award herein, on the following, among other, grounds: That the award assumed to be the decision of the arbitrator Morrison alone, and there was no expression therein of its being the award of the arbitrator Lobb: that the arbitrator Lobb was guilty of improper conduct in consulting with the officers of the company privately and in the absence of the other arbitrator and parties, and in entertaining propositions of pecuniary benefit from the company: that the arbitrator Morrison was guilty of improper conduct in receiving and giving weight to the unsworn evidence of the arbitrators Lobb and Castle, at a

(a) The judgment in this case was delivered by OSLER, J., sitting alone, in Easter Vacation; but, to save delay, it is published amongst the Term judgments.

time when Hubbard had no opportunity of cross-examining them ; and also in associating, after the close of the evidence, with the officers of the company, and consulting privately with Lobb and the officers of the company in reference to the arbitration : that the award was not signed by the arbitrators Lobb and Morrison in the presence of the arbitrator Castle.

Several other objections were taken in the rule, but it is not necessary to refer to them.

It appeared that Hubbard having sustained a loss upon some property insured by him with the company, it was agreed that the value of the total loss should be ascertained by three arbitrators, one to be appointed by each party, and the third by the other two, and that the award of any two of the arbitrators should be final. Messrs. Lobb and Castle were appointed on behalf of the company and Hubbard respectively, and they appointed Morrison as the third arbitrator.

The proceedings seemed to have been conducted in rather a confused and irregular manner, and on the 12th or 13th May, the following document, treated as the award, and now moved against, was executed by the arbitrators, Morrison and Lobb :

“Having been appointed to act as third arbitrator or umpire, by Messrs. James Lobb and James Castle, to enquire into what loss was sustained by fire to the property of James H. Hubbard, beg to report that I have carefully examined the evidence given by the different witnesses, and from the contradictory manner that it has been given, beg to say that it was a very difficult matter for me to arrive at a just decision between the different parties interested ; but after carefully reading over the evidence again, and discussing that with the two gentlemen, Messrs. Lobb and Castle, who were appointed arbitrators by the different parties to examine the premises the morning after the fire, I have come to the conclusion that there could not have been the amount of teas consumed that the plaintiff, Mr. Hubbard, claims, and will

therefore give a few reasons why I have come to that conclusion." He then set out his reasons, and continued: "My decision is, therefore, Mr. Hubbard's total loss \$160, which amount includes the portion of \$53.75 of total loss already granted by Messrs. Lobb and Castle, thereby reducing the award for total loss to \$106.25.

J. MORRISON,
JAMES LOBB."

James Castle, one of the arbitrators, swore that this document, which was in the hand-writing of the arbitrator Morrison, was produced by him at a meeting held on the 6th of May, being the third meeting, and that Morrison then stated that he had been guided in coming to the conclusion therein mentioned more by the statements of himself (Castle) and Lobb, than by the evidence, he having examined them at the second meeting as to the condition of the *debris* after the fire: that on the adjournment of the third meeting it was understood that there should be another meeting to consider the question of costs: that on the 12th May he arranged with Morrison for a meeting at Lobb's office at four o'clock: that on arriving there he found Morrison and Lobb present, with McCord, the manager of the company, and Squier, the inspector: that Morrison, Lobb, McCord, and Squier, had the papers relating to the reference before them: that the subject of costs was talked over for some time, McCord and Squier joining in the discussion: that the two latter then left the room at Morrison's request: that a "memorandum" was then drawn up signed and sealed by three arbitrators, which was written on the back of the submission, and was in these words: "The arbitrators have agreed that the Union Fire Insurance Company pay the expenses of the arbitrators and do pay balance of awards, namely, \$145 in cash to Mr. Hubbard for total loss sustained:" that McCord and Squiers were then called in and this memorandum was read to them, and they objected to the amount named therein as payable to Hubbard. The arbitrator Lobb sustained their objection, and then Morrison

erased that sum and substituted the sum of \$6.13 to suit McCord's proposition. This memorandum was understood by Castle to be made only with the view of fixing how the costs of the arbitrators were to be paid, and embraced the amount of a former award between the parties as to partial loss sustained on the property insured. An instrument in the form of an award was then produced, which had been drawn by the solicitors of the company, blanks having been left for the amount to be awarded, and was read over by Morrison and McCord, the latter filling up the blanks, inserting \$198.25 expenses of arbitration and \$6.13, amount of total loss payable to Hubbard, and the arbitrator Morrison signed it. Castle refused to do so, and according to his statement a general discussion took place, in which all present took part, as to the kind of award which should be made, but no definite conclusion was arrived at, and the meeting adjourned, at McCord's suggestion, without any further understanding or arrangement as to future proceedings.

The arbitrator Morrison stated that the "memorandum" was made only with the view of disposing of the costs of the arbitration and of the former award, both of which matters he thought at first they had power to deal with in the reference now in question, but that on finding they could not deal with them he determined simply to award in respect of the whole loss: that they did not make their award upon the blank or draft award prepared by the company's solicitors, because he was anxious that their conclusion should show some of the facts on which it was based, and that it was for this reason he had drawn up the paper now called the award.

Lobb said that Morrison, Castle and himself were present when the question came up of finally deciding upon the amount to be awarded: that Morrison had drawn up a sketch of the reasons why such amount had been arrived at: that the sum was about \$160: that he (Lobb) pointed out that this sum included the value of property embraced in the former award, which was accordingly deducted, and

that it was then decided that the award should be for the amount thus arrived at: that Castle then left the room, stating that he would not sign the award, and that the award in its present shape was shortly afterwards completed and signed by Morrison and himself at the same time. In another paragraph of his affidavit, referring to the "memorandum," he stated that it was not considered as an award at all, as it was distinctly understood by all parties present that Morrison was to draw up the award, and accordingly when it was completed and signed by himself and Morrison all parties were notified to attend and hear it read, and that McCord and Castle attended pursuant to the notice. Morrison stated, in a further affidavit, that at the meeting on the 12th it was fully decided in the presence of Castle that the award should be for \$160, less the value of four-and-a-half chests of tea included in a former award, "but when Castle asserted that he would not sign it, and there had to be some words added to the draft I had prepared, and as it was then ten in the evening it was decided that we should meet the following morning and make the amendments necessary and sign the award, and that this appointment was distinctly made in the presence of Castle, who replied that in that case it was unnecessary for him to attend any further, as he had made up his mind not to sign the award for the amount agreed to.

6th June, 1879. *A. C. Galt*, shewed cause.

Beaty, Q. C., and *Davin*, contra. The arbitrators had no power to alter the award after it had once been executed: *Helps v. Roblin*, 6 C. P. 52; *Henfree v. Bromley*, 6 East 309; *Russell on Awards*, as quoted by Hagarty, J., in 6 C. P. p. 56; *Trew v. Burton*, 1 C. & M. 535. On the point of publication they referred to *Curteis v. Kendrick*, 3 M. & W. 461, and as to consulting with the parties and partiality, *Dobson v. Groves*, 6 Q. B. 637; *In re Lawson and Hutchinson*, 19 Grant 84; *Walker v. Frobisher*, 6 Ves. 70. Then, the award must be that of at least two of the arbitrators

not of the three, whereas the award was wholly in the first person, and confessedly the award of Morrison though signed by Morrison and Lobb: *Templeman v. Reed*, 9 Dowl. 962.

10th June, 1879. OSLER, J.—The objection that the award was made by two of the arbitrators without notice to the third, or without giving him an opportunity of joining in the award, is, I am inclined to think, satisfactorily met. On the 12th of May it appears that all the arbitrators met, and the amount was agreed upon by Lobb and Morrison, but Castle refused to agree, and an appointment was made in Castle's presence for signing the award on the following day, and the award was then signed by Lobb and Morrison. If Castle had notice of the appointment and did not attend, that is all that was necessary to enable the other two to make a valid award: *Wade v. Dowling*, 4 E. & B. 4.

The remaining objection relates to the misconduct of the arbitrators in permitting the company's officers to be present and consulting with them in the absence of Hubbard, and as to the form of the award.

I must give effect to both of these objections.

At the meeting of the 12th May, which was not a meeting called for the purpose of signing the award, the arbitrators permitted the officers of the company, McCord the manager, and Squier the inspector, to be present at and take part in a discussion as to the amount of the award and the costs of the reference. This fact is not substantially denied, and although the arbitrators who made the award may not have been influenced by it, and may have intended to make a fair and just award between the parties, it was an extremely irregular and improper proceeding. An arbitrator is a judge, and it is illegal for him to hold private conferences with either of the parties on the subject of their disputes. The law regards with the greatest jealousy and suspicion an award made under such circumstances as have been shewn to exist in the

present case, and following numerous authorities I feel myself bound to set it aside: *Lawson v. Hutchinson*, 19 Grant 84; *Pardee v. Lloyd*, 15 L. J. N. S. 130.

I think it is also bad as not being the award of two of the three arbitrators. It professes, from the first line to the last, to be the award of Morrison, who appears to have considered himself an umpire. If it had been drawn up as the award of a single arbitrator only, and had then been signed by the two, it might have been supported as the award of two, by analogy to the case of the promissory note, signed by more than one person and beginning, "I promise to pay"; but here the recitals and the other contents of the instrument shew that it is Morrison alone who is speaking, and it is his award alone. It is true that Lobb has added his name below that of Morrison's, but does that make it his award? In my opinion it does not, when the document professes, as here, to be only the award of the third arbitrator: *Bonter v. Northcote*, 20 C. P. 76.

I think the applicant is entitled to his costs.

Rule absolute, with costs.

MITCHELL V. GOODALL.

Equitable assignment of non-existing fund—Assignment of chose in action—
R. S. O. ch. 116.

One W., plaintiff's tenant, being in arrear for rent, and having wheat in the barn, had a settlement with plaintiff, when plaintiff told him he must give him security before he would allow him to ship his grain. It was agreed that plaintiff should see defendant, to whom W. had been in the habit of shipping his produce, and ascertain whether he would accept an order from W. for the grain. Defendant agreed to accept the order which he drew out, mentioning, however, no amount. Plaintiff and W. then saw defendant, when W., in defendant's presence, signed an order on defendant for \$299 85 in the plaintiff's favour, which defendant said he would pay as soon as he realized on the grain. There was conflicting evidence as to whether plaintiff did or did not tell defendant that unless he got the order he would not let the grain go; but he admitted that he drew the order, and its execution by W., and that he told plaintiff he would pay it. The grain had not at that time been, but was on the 4th of October following, shipped to defendant, who subsequently sold it and paid the proceeds to W., who had verbally instructed him before the receipt of the grain not to pay the order in plaintiff's favour, though written instructions to that effect did not reach him until after its receipt.

Held, that plaintiff was not entitled to recover as on an assignment of a chose in action under R. S. O. ch. 116; but, *Held*, CAMERON, J., dissenting, that the property was stamped with the equitable right, and that defendant was not merely cognizant of such claim, but had promised to co-operate in enforcing it, and that when the property reached his hands he was bound to carry out the trust, and no interference on W.'s part could relieve him from the obligation.

Per ARMOUR, J.—That the plaintiff was entitled to succeed on the common counts.

Per CAMERON, J.—That at the time of the order, claimed by plaintiff to constitute an equitable assignment, there was no fund in existence upon which it could operate, and no contract proved that W. would deliver the grain to the defendant: that W. was, therefore, at liberty to make any arrangement he pleased with defendant, and when he delivered the grain to him, after notifying him not to pay the order, defendant must be held to have received it on the understanding that he would not pay it.

THE declaration stated that one Wood, by order in writing, directed to the defendants and dated 2nd October, 1878, absolutely assigned to the plaintiff the sum of \$299.85, with interest at one per cent. a month, money due or to become due to said Wood in the hands of the defendant, of which order the defendant had notice and accepted the same: that at or after the giving of said order, and after giving said notice and before action, the defendant was

indebted to Wood in money more than sufficient to pay the sum so assigned to the plaintiff: that the plaintiff, after the defendant became indebted to Wood and before action, demanded from the defendant payment of the sum so assigned, but the defendant refused to pay.

The second count was for money payable, for money had and received to the plaintiff's use, and on account stated.

Pleas: 1. Denial of assignment.

2. Denial of money due to Wood in defendant's hands.

3. Denial of notice.

4. That the defendant did not accept.

5. That the defendant was not indebted to Wood as alleged.

6. Denial of demand.

7. That the defendant did not refuse to pay.

8. Never indebted and payment, to common counts.

Issue.

The case was tried at the last Winter Assizes at Toronto, before Hagarty, C. J., without a jury.

It appeared that one Wood was tenant of the plaintiff of a farm in Vaughan, and on the 1st October, 1876, was in arrear for rent: that he had some hundred bushels of wheat in the barn, and that he had been in the habit of consigning his produce to the defendant, who was a commission merchant in Toronto.

On the 2nd October the plaintiff had a settlement of accounts with Wood in Toronto. He told Wood he must have security before he could allow him to ship the grain, and they agreed that the plaintiff should see if the defendant would accept an order from Wood for the amount due. The plaintiff stated that he then saw the defendant and told him of his position with Wood, and that he could not let the grain go without security. The defendant said he would accept an order, and the defendant then drew out a form of order, not mentioning the amount. The plaintiff then brought Wood to the defendant, and in defendant's presence Wood signed the following order:—

"TORONTO, October 2, 1878.

"J. Goodall.

"Please pay W. A. Mitchell, Esq., two hundred and ninety-nine $\frac{85}{100}$ dollars, together with interest at 1 per cent. a month on above from 1st September, 1878, from proceeds my consignment.

(Signed)

"THOMAS WOOD."

Plaintiff said he would of course pay it as soon as he realized the consignment. Wood asked plaintiff if he intended pushing him to sell. Plaintiff said no, as wheat was low. Defendant remarked that Wood was paying one per cent. a month.

Plaintiff said he intended to have called again to get defendant to put his name on the back of the order.

Defendant stated that plaintiff did not tell him that unless he got the order he would not let the grain go. He admitted that he drew out the order and its execution, and that he told plaintiff he would pay Wood's order if it was all right.

At that time the grain had not been consigned to the defendant.

It appeared that the wheat was removed from the farm on the 4th of October.

Defendant received the grain on the 8th of October.

Defendant sold the grain about the 8th of October, and received the proceeds on the 12th of October, and the same evening (Saturday) defendant remitted the money to Wood.

Defendant said that before he received the grain Wood came to him and said the order he had given to plaintiff was unjust, or that he was not going to pay it, because he did not owe the money, and ordered defendant not to pay it.

Defendant told Wood if he did not want him to pay to give him an order in writing. He went home and sent one by post, as follows:

"Mr. Goodall:

"MAPLE, Oct. 7.

"This is to notify you that I have found the account for which Mr. Mitchell has my order on you to be incorrect, and advise you not to pay it without further instructions.

"By so doing you will oblige.

(Signed)

"THOMAS WOOD."

Defendant said he could not say if he got this order before the grain arrived. He would not probably get it till a day, or two days, after the arrival of the grain, but he had received the verbal directions two or three days previously.

There was no doubt but that plaintiff again saw defendant before he sent the money to Wood. The evidence seemed clear that defendant knew that plaintiff was always insisting on his right to receive the money on the order before he paid it over.

At the trial the plaintiff's right to recover seemed to be rested wholly on the assumption that there had been an assignment by Wood, under the Ontario statute, of a debt due or to accrue due by defendant to Wood, and the case of *Brice v. Bannister*, L. B. 3 Q. B. Div. 569, decided last year in the Court of Appeal, was strongly relied on by the plaintiff's counsel, who had evidently framed his declaration thereon.

The learned Chief Justice expressed an opinion that the case did not come within the principle of either the Imperial or the Provincial Statute as to the assignment of debts, and a verdict was entered for defendant, with leave to plaintiff to move to enter the verdict for him.

In Hilary Term last, February 4, 1879, *Rose* obtained a rule *nisi* accordingly.

May 30, 1879, *McMichael*, Q. C., shewed cause, citing *Brice v. Bannister*, L. R. 3 Q. B. D., 569.

Rose, contra. The tenant Wood assigned to the plaintiff a debt or chose in action, and though it is contended that no contract existed between defendant and Wood, which the defendant could enforce, it is submitted that the contract could have been enforced at the instance of the plaintiff by bill filed against defendant and Wood, and it is immaterial whether the contract could be enforced at the instance of the plaintiff or of the defendant.

Then, there was an equitable assignment of the grain in question, and the defendant having knowledge of the facts,

when the grain came into his hands it came charged with the trust, and he could not dispose of the grain or the proceeds thereof in fraud of the agreement.

He referred to *Rodick v. Gandell*, 1 D. M. & G. 763; *Yeates v. Groves*, 1 Ves. Jr. 280; *Ryall v. Rowles*, 2 W. & T. L. C. 729; *Langhton v. Horton*, 1 Hare, 549; *Bunting v. Georgen*, 19 Grant 167; *Burn v. Carvalho*, 4 M. & C. 690; *In re Thirkell*, *Perrin v. Wood*, 21 Grant 492.

At the close of his argument he applied for leave to add the following count :

For that one Thomas Wood, being tenant of the plaintiff of a certain farm in the county of York, it was agreed by and between the plaintiff and said Wood, that said Wood should surrender the term and quit said farm and should have the privilege of reaping and selling the following crop of fall wheat on paying all rent due to said plaintiff at the time of selling said crop or on giving security therefor: that thereafter said Wood being indebted to said plaintiff in the sum of \$299.85 for rent of said premises, and being desirous of selling said following crop and removing the same from said farm, it was agreed by and between the plaintiff and said Wood, that said Wood should secure said plaintiff the payment of said rent by consigning said wheat to the order of the defendant, a commission merchant in the City of Toronto, for sale, if the said defendant would agree to accept and sell said wheat and pay over the proceeds to the plaintiff to the extent of said rent; that thereupon the plaintiff informed said defendant of said indebtedness, and requested him to receive said grain, sell the same and pay him over the proceeds to the extent of said indebtedness, which said defendant agreed to do; that thereupon the said Wood gave the plaintiff an order on the said defendant to pay said indebtedness out of the proceeds of said grain, to the terms of which order the defendant assented and promised the plaintiff to pay him said moneys. That thereupon the plaintiff relying on the performance of the said agreement by said Wood, and said defendant permitted the said Wood

to remove said grain, and said Wood did remove and ship the same to the defendant who sold the same and realized therefrom more than sufficient to pay the amount of said order; that said Wood after obtaining the said grain in fraud of the plaintiff and of said agent forbid the defendant paying said money to the plaintiff, and the defendant thereafter wrongfully refused to pay the same to the plaintiff.

August 30, 1879. HAGARTY, C. J. I remain of the opinion I formed at the trial, that the case is not within our statute. I cannot see how there was any debt or chose in action arising out of the contract existing between Wood and this defendant at the time the order was given; nor was any claim due or to be become due existing between them, which was either assigned or assignable under the Act.

I think, in short, that to bring a case under the Act, there must be some existing claim, matured or maturing, arising out of some existing contract at the time of the alleged assignment.

Here there was nothing whatever existing between Wood and defendant.

Had the case come within the facts of *Brice v. Bannister*, I would, with profound reluctance, have felt compelled to follow the judgment of the majority of the Court, as my humble opinion would have fully coincided with that of the dissenting Lord Justice Brett.

But the case before us, is susceptible of a wholly different aspect, and in Term Mr. Rose proposed to amend the record by adding the following count.*

We have now to consider if the claim can be upheld on this or on the count for money received to plaintiffs use.

If the wheat had actually been in defendant's possession or control, or was on its way on consignment to him, I am

* Ante page 402.

of opinion that the effect of the order given by Wood and defendant's promise thereon to plaintiff would create a binding liability on defendant.

In *Griffin v. Weatherley*, L. R. 3 Q. B. 758, Lord Blackburn says: "Ever since the case of *Walker v. Rostron*, 9 M. & W. 411, it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise, and the money becomes a fund received, or to be received, for and payable to the transferee; and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder."

There the action was against the official liquidators of a company which owed A., and A. gave an order on them to pay plaintiff, his creditor, the amount defendants agreed to pay when in funds, which they then were not. Afterwards they had funds and were held liable.

In *Walker v. Rostron*, plaintiff had sold goods to B. and taken his acceptance therefor, and consigned the goods to defendant, as B.'s agent, at Rio. Afterwards, wishing for further security, it was agreed that B. should write to the defendant directing him, out of proceeds of consignment, to pay the acceptances. This was assented to by defendant. B. became bankrupt, and defendant under indemnity paid proceeds to his assignee. The Court held that the plaintiff could recover. Lord Abinger says, (p. 421), that B. could not alter the direction of the consignments: they were already in defendant's hands or those of his partners abroad. "The question is, whether he could authorize defendant to disregard the arrangement so made, and to pay the proceeds to anybody else. If he could, of course his

assignee had the same power. But we are of opinion that neither he nor his assignee could do so" * * This appears to fall within the class of cases where, when an order has been given to a person who holds goods to appropriate them in a particular manner, and he has engaged so to do, none of the parties are at liberty, without the consent of all, to alter that arrangement.

Dickinson v. Marrow, 14 M. & W. 713, seems to uphold the same general doctrine, and the distinction is pointed out between a mere order to pay and an order transferring the debt, or an equitable assignment. Pollock, C. B.: "If it was a mere order to pay, it was revoked; if it was an equitable assignment, the revocation did not operate." There the goods were under consignment to defendants when the order was made.

It is said that where money is paid on the faith of a representation that a security for it would be paid out of a particular fund, the party who receives the money and makes the representation will not be allowed to withdraw the fund out of which the promised payment is to be made: *Thompson v. Simpson*, L. R. 9 Eq. 497. That case also states the principle that a representation made by one party for the purpose of influencing the conduct of another and acted on by him, will in general be sufficient to entitle him to the assistance of a Court of equity for the purpose of realizing such representation.

This case was reversed, L. R. 5 Chy. App. 660, on the ground of the insufficiency of the evidence to establish the right.

In *Burn v. Carvalho*, 4 M. & Cr. 700, Lord Cottenham discusses the principle of equitable assignment: "In equity an order, given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund." He then adds: "Sir John Leach thus defines an equitable assignment, 'In order to constitute an equitable assignment there must be an engagement to pay out of a particular fund.' Upon this principle it is

that assignments of future freight and of non-existing but expected funds have been enforced in equity."

In *Holroyd v. Marshall*, 11 H. L. 209, Lord Westbury states the principle very clearly.

The cases are fully discussed in the notes to *Ryall v. Rowles*, 2 W. & T. L. C. 771.

I think that in the case before us there was a good equitable assignment of the fund, *i.e.*, the grain and the proceeds thereof, and that a Court of equity would interpose to enforce the bargain and to prevent Wood from altering its destination or disposing of it otherwise than as agreed, or to plaintiff's prejudice.

I also think that Wood had no right or power to countermand his order or vary the disposition of the grain.

The only hesitation I have felt is this. It is clear that if Wood had not sent the grain to defendant the latter would have incurred no liability; but the moment the grain reached defendant on the original contract there could be no possible right or power either in Wood or defendant to deal with it otherwise than as contracted.

When Wood, prior to defendant's receiving the grain, comes to him and, so far as he can, revokes and countermands the order, and informs defendant that he will not send the grain to him on any such contract, but only as Wood's own property, and subject to his disposition, and defendant assents (so far as he can) to the revocation and abandonment of the first bargain, then it seemed to me doubtful whether defendant's subsequent receipt of it was not on a different trust and basis. Wood would not have sent it on the first contract, so that as between him and defendant it was in fact received as Wood's absolute property, and under his control.

I have not seen any case in which this aspect was presented. Lord Justice Brett, speaking of equitable assignment, says, in *Field v. Megaw*, L. R. 4 C. P. 664: "The law upon this subject is brought to such an exquisite degree of refinement that it is by no means easy to understand it."

But it seems to me, on the whole, that the true view is,

that there was stamped upon the property the clear equitable right and interest of plaintiff to be paid his claim thereout; that defendant was not merely fully cognizant of such claim, but had promised on his part to join in the enforcing of it, and that whenever afterwards the property reached his hands, that, as between him and Wood and plaintiff, the original trust must be carried out, and that no interference by Wood, and no act done, either by him or defendant, solely or jointly, can release the liability of the latter, incurred by him to plaintiff whenever the grain reached his hands through Wood.

The defendant might have relieved himself from difficulty by telling Wood that he, the defendant, must perform his part of the bargain whenever the grain came into his hands. He would not have been responsible for any failure of Wood to deliver it to him.

I have examined a number of cases, but I do not cite them, as they are to be found in the authorities to which I have referred.

I ought to add that I should have found on the facts, without hesitation, that there was a bargain made by Wood with the plaintiff that he would ship the grain to the defendant on the agreement that the defendant should pay the plaintiff's claim, and that the latter acted thereon.

I think the rule must be absolute to enter a verdict for plaintiff for the amount claimed.

ARMOUR, J.—The plaintiff is, in my opinion, entitled to a verdict upon the count for money had and received.

The order given by Wood to the plaintiff constituted, in my opinion, a good equitable assignment to the plaintiff of so much of the proceeds of the sale of the wheat to be consigned to the defendant as amounted to the sum for which the order was given, and having been made for a valuable consideration, was irrevocable.

The defendant assented to this assignment, and promised to pay the amount of the order out of such proceeds.

Having done this, and the wheat having been consigned

to and sold by him, and he having received the proceeds of the sale, such proceeds became, to the amount for which the order was given, money had and received by him to the use of the plaintiff.

CAMERON, J.—I regret that I am not able to concur in the conclusion arrived at by the majority of the Court. There can be no question, as stated by the learned Chief Justice, that the plaintiff must fail if this case rested upon the Mercantile Amendment Act, R. S. O. ch. 116, as there was neither a debt nor contract between Wood and the defendant out of which a debt or claim could arise, and his right to recover must depend upon his being the assignee in equity of the wheat sold by the defendant, or by reason of the defendant being precluded in equity from alleging that upon the facts as against the plaintiff, the money received by him for the wheat was not received for the plaintiff's use. Had the wheat been in the defendant's hands at the time the order upon him was given by Wood to the plaintiff, then the defendant having promised to pay the order out of the proceeds of the sale, there would have been under the authorities a clear appropriation by Wood of the amount of the order to the plaintiff's use, having all the essentials of a binding and irrevocable assignment in equity; but the wheat was not in his possession, nor had any contract been made by which either he or the plaintiff could have compelled Wood, either at law or in equity, to place the grain in his hands for sale. The plaintiff's account of the transactions is: "I wrote to Wood informing him that I wanted security for the rent before he could ship the grain. He telegraphed me he would be in and see me about the matter before he shipped. He was in on the 2nd October, on the day he promised, and in our office we made out a statement of the amount he owed me, which was perfectly satisfactory. We settled on the amount and agreed to the proposition to see if Goodall was agreeable to accept an order from him in my favour. The grain was still on the premises. I went to Goodall,

the defendant, a commission merchant in Toronto. I went to see if he would accept the order. I told him I had a tenant who intended shipping some grain to him, and as I had a claim against him for rent, I would not leave (quære, let the grain leave) the place without security, and asked him if he would accept an order from Wood for the amount. He said he would, and drew out a form of order without the money being mentioned. I went and met Wood and brought him to Goodall's office. He came to Goodall's office and signed the order. Goodall was present when Wood signed it. Goodall said of course he would pay it as soon as he realized on the consignment. I intended to call round a few days afterwards and get Goodall to put his name to the back of the order. * * * On the 11th October I called round and demanded payment of the order. Goodall informed me that he had received word from Wood not to pay the order." In cross-examination he said * * * "The wheat was taken off the premises on the 4th October. I telegraphed several times to find out to whom the wheat was consigned, and I found out that it was consigned to Mr. Goodall. The defendant swore he never understood from any one that any one could hinder Mr. Wood from sending the grain in. I never heard of any thing from Mitchell that unless something was done he would not let the grain go. Wood did not accompany Mitchell when Mitchell came first to our office; when Mitchell came first he asked if we would pay an order from Wood. I said yes, if it is all right. I think there was reference made to the grain. He spoke of Wood sending some wheat. He knew that Wood was in the habit of sending us wheat. He asked what an order was like, and after I told him what it was like, he asked me to write a form and I did so. This (the order in evidence) is what I wrote; at that time the grain had not been consigned to me. The next time I saw Mitchell was when he came into the office with Wood. They asked for pen and ink, and I asked them to go to the desk, where they went, and Wood, I presume, signed his name to the order. I think they

filled up the order there. I think I heard something about one per cent being unusual interest. I saw it, the order, after it was signed. He took the order away. He did not ask me to write anything on it. After that I saw him two or three days afterwards. At that time the grain had not come yet. Wood came in before we received the grain. He told me that that order that he had given on me was unjust, or at least that he was not going to pay it, because he did not owe the money. He told me not to pay the order; this was before the grain came. * * * The first day I had control of the grain was on the 7th or 8th. We had the warehouse receipt on the 7th or 8th. I effected a sale about the 8th, and got the money on the 12th, on Saturday. It was on Saturday the 12th that Mitchell came to me."

This is all the evidence that was given to make out the facts necessary to establish an equitable assignment, and the question is, does it make that out? At the first interview between the plaintiff and defendant, nothing occurred that would impose any liability upon the defendant. There was nothing definite arranged. All that the defendant said or did was in effect no more than an intimation that he was prepared to pay any money he might receive on Wood's account to any one having Wood's authority to receive it. At the second interview he had notice that Wood had signed the order, according to his own admission, and, according to the plaintiff's statement, he said of course he would pay as soon as he realized on the consignment; but he was not then asked to accept the order, and why? The plaintiff said he intended to call round in a few days afterwards and get Goodall to put his name to the back of the order. Why not have had that done at the time, if the transaction had been completed, and all parties had determined that the grain should go to the defendant and be disposed of by him? The plaintiff seems to have doubted as to whether the grain would be or was shipped to defendant, as he telegraphed several times, he swore, to ascertain to whom the consignment had been made. The evidence in this respect does not go far enough

to show that by the arrangement between the parties defendant was to be the medium of sale of the grain, and for all that appears in evidence, Wood might not have then fully made up his mind to sell through defendant, though of course it was probable that he would, as he had done so in previous years. It is not anywhere stated in terms that it was agreed between the plaintiff and Wood that Wood should send the wheat to defendant, or that the plaintiff consented to the removal of the grain on this condition. It may be conjectured it was agreed, but it is not proved, and I do not think we are at liberty to draw this conclusion from the evidence.

I think the signing of the order to defendant by Wood, did not give the plaintiff a lien on the grain and it came into defendant's possession, solely as the grain of Wood; and when the proceeds were realized they were money received for the use of Wood and not for the use of the plaintiff.

I think it will be found in all cases, where an equitable assignment has been made out, the thing assigned has been in existence, or there has been a contract by which it would be created or brought into existence. Thus, in the present case, if the facts shewed that Wood had contracted with defendant to deliver him all the wheat in his barn for sale on commission, and then had assigned his right to the proceeds to the plaintiff, of which the defendant had notice, he would be liable to pay the proceeds to the plaintiff, though he had not agreed to do so, and he would not be permitted to make any agreement with Wood by which the plaintiff would be prejudiced in respect of the grain. It may be that what took place between the plaintiff and Wood, when the latter surrendered his leases, gave the plaintiff a lien on the crop then in the barns for rent, but the facts as to this do not sufficiently appear in evidence, and it would not appear that under the circumstances there was any right of distress remaining in the plaintiff, or any right to interfere with the grain in any way, the possession of the premises at

the time of the removal of the grain being in a stranger and the terms on which he held not appearing in evidence legally or with sufficient certainty. If, as Wood swore, there was an error in the order as to the amount of his indebtedness to the plaintiff, arising through a misrepresentation on the part of the plaintiff, he might, under certain circumstances, have a right to have the order rectified, or even to vacate it altogether.

It appears to me, therefore, that the truth of this assertion should be investigated before it can be determined whether the plaintiff is entitled to succeed, and if to succeed, to what amount; and so there should be a new trial, if the plaintiff can maintain the action at all, in order that this enquiry may be made.

I dissent from the conclusion arrived at by my learned brothers solely on the ground that, in my judgment, at the time the order claimed by the plaintiff to constitute an equitable assignment was given there was no fund in existence on which it could operate, and no contract proved that Wood would deliver the grain to defendant. So Wood was at liberty to make what arrangement he chose with defendant, and when he delivered the grain to the defendant, after notifying him not to pay the order he had given to the plaintiff, the defendant must be held to have received it on the understanding that he would not pay that order.

There is no evidence as to whether Wood had any other grain than that in the barn on the premises, and none, as I have already said, that he had made any agreement with the defendant to have this particular grain sold through him, and the order itself is silent as to what the consignment mentioned therein was to be. It is, "Please pay W. A. Mitchell \$299.85, together with interest at 1 per cent. on above from 1st September, 1878, from proceeds my consignment."

Specific performance of a contract relating to chattels will not be decreed where no special existing chattels are specified: *Holroyd v. Marshall*, 10 H. L. 212, where Lord Westbury says, in reference to the opinion of Baron Parke

in *Mogg v. Baker*, 3 M. & W. 198, if the contract in *Mogg v. Baker* related to no specific furniture, it is true that it would not at the time of its execution confer any right in equity; but it is equally true it would attach on furniture answering the contract when acquired, *provided the contract remained in force* at the time of such acquisition; and it may be questioned here whether there was any sufficient indication of what was to be consigned in the writing produced or the verbal evidence.

This defendant appears to have acted in good faith, in the belief that what had taken place did not entitle him to withhold from Wood the proceeds of the grain received after the countermand of the order, and it does not seem to me that it would be just to carry the doctrine of equitable assignment further than the adjudged cases go, to impose a liability upon him. It may be, however, that in principle the facts of this case do bring it within the rule established in equity, with respect thereto, and that my learned brothers are right in the conclusion they have come to, though I am unable to concur therein.

I think, therefore, the verdict entered for defendant at the trial should be allowed to stand, or that there should be a new trial to allow of the facts being fully disclosed.

Rule absolute.

NASMITH V. DICKEY ET AL.

R. W. Co.—Action by judgment creditor against shareholder.

N. D., one of the defendants, having a claim against a railway company for \$1,800, assigned it to one H. by an instrument absolute in form, but really in trust, to enable H. to sue first the railway company and then the defendants, as shareholders of unpaid stock of the company. H. accordingly recovered judgments against both the company and the defendants, but made no effort to realize on that against the latter. After the commencement of this action, however, which was by a judgment creditor of the railway company against the defendants, as shareholders of the company, for their unpaid stock, defendants' solicitors gave a cheque for the \$1,800 to H., who, after retaining \$127, the amount of a claim he had against N. D., handed over the balance to him, and the defendants then set up as a defence to the action this payment under the judgment recovered by H. against them; but, *held*, on the facts in evidence, that the judgment so recovered against the defendants and the alleged payment thereunder, constituted no defence to the claim of an ordinary judgment creditor, and that in fact the stock of the present defendants had not been paid up to the extent of \$1,800, which was therefore liable to plaintiff's claim.

Held, also, HAGARTY, diss., that plaintiff could recover the interest on the calls made by the company for that amount of the stock.

THE declaration stated that the plaintiff on the 15th day of August, A.D. 1877, recovered judgment against the Toronto, Grey and Bruce Railway Company for \$5,582.74, together with \$20.70 costs: that the said company was a body corporate under and by virtue of the Act of the Parliament of the Province of Ontario, passed in the 31st year of Her Majesty Queen Victoria, entitled an Act to incorporate the Toronto, Grey and Bruce Railway Company; and that on said 15th day of August a writ of *fieri facias* was issued out of the said Court of Queen's Bench upon the said judgment, directed to the sheriff of the County of York, against the property and effects of the said company, commanding him to levy of the goods and chattels of the said company in his bailiwick the sum of \$5,603.45, to which the said sheriff returned that there could not be found sufficient or any property or effects in his said bailiwick whereon he could levy such execution or any part thereof, and which said writ of *fieri facias* and said return, "no goods," endorsed thereon, had been returned and was then on record in the said Court, and that execu-

tion of the said judgment still remained to be made to the said John Nasmith ; and that the defendants were the holders of and were entitled to thirty shares in the capital stock of the company, and their names were entered on the list of such shareholders kept by the company under the Act of Parliament in that behalf as the persons entitled to the said shares, and that there still remained due on and in respect of each of the said shares the sum of \$60, in all \$1,800, together with interest from the 1st day of January, A.D. 1874.

The defendants pleaded several pleas, but the third only is now material, being that in respect of which the defendants rested their defence. This plea set out for a defence, which arose after the commencement of the action, that there did not remain due on and in respect of each of the said shares, the sum of \$60, in all \$1,800, together with interest from the first day of January, 1874, any sum whatsoever, inasmuch as one Glover Harrison, then being a creditor of the said Toronto, Grey, and Bruce Railway Company, recovered a judgment against the said Toronto, Grey, and Bruce Railway Company in the Court of Common Pleas, on the 17th day of February, 1876, for the sum of \$1,800, and thereafter a writ of *fiery facias* was issued out of the said Court of Common Pleas upon said judgment, directed to the Sheriff of the County of York, against the property and effects of the said Toronto, Grey, and Bruce Railway Company, commanding him to levy of the goods and chattels of the said Toronto, Grey, and Bruce Railway Company, in his bailiwick, the sum of \$1877.50c., to which the said sheriff returned that there could not be found sufficient or any property or effects in his bailiwick whereon he could levy such execution or any part thereof, and which said writ of *fiery facias* and return of *nulla bona* endorsed thereon had been returned to and was then of record in the said Court of Common Pleas ; and the defendants further averred that thereafter the said Glover Harrison instituted an action against the defendants, as such shareholders, and prosecuted the same to judgment,

and thereupon the said defendants paid to the said Glover Harrison the sum of \$1,800 in full of his said judgment, and of the balance then remaining due on the said stock of the defendant, and they also paid his costs of suit; and they further averred that the whole amount of their stock was paid up and nothing remained due in respect thereof. The plaintiff joined issue upon this plea, and for a second replication alleged that the said Glover Harrison was a creditor as in said plea mentioned only in respect of a certain claim or cause of action which he held as trustee for the said defendant Nathaniel Dickey, and said judgment first in said plea mentioned was recovered by the said Glover Harrison solely upon and in respect of said claim or cause of action hereinbefore mentioned, as trustee for said Nathaniel Dickey, and the said Glover Harrison instituted and prosecuted to judgment the said action against the now defendants in said plea mentioned, as trustee of and for the said Nathaniel Dickey; and the now defendants did not defend the said last mentioned action, but suffered and permitted judgment therein to be recovered against them by default; and the said Glover Harrison never had any beneficial interest in the said claim or cause of action firstly in this replication mentioned, or in the said judgments, or either of them, and all proceedings had or taken by the said Glover Harrison, as in the said plea mentioned, were so had or taken by him as such trustee for the said Nathaniel Dickey, and at the request costs and expense and for the sole benefit of the said Nathaniel Dickey, who was at all times the equitable and beneficial owner of the said claim or cause of action firstly herein mentioned, and of the said two judgments herein, and in the said third plea mentioned, and the moneys paid by the defendants to the said Glover Harrison, as in said plea mentioned, were so paid to and received by him as trustee for the said Nathaniel Dickey, and for his the said Nathaniel Dickey's sole use and benefit; and the defendants at all times had full notice and knowledge of all the facts in this replication mentioned.

And for a third replication to the said third plea the

plaintiff alleged that before and at the time of the recovering by the said Glover Harrison of the said judgment against the Toronto, Grey, and Bruce Railway Company, and from that time forward the plaintiff was, and still continued, a creditor of the said the Toronto, Grey, and Bruce Railway Company; and the plaintiff, subsequently to the recovery of the said last mentioned judgment, recovered judgment against the Toronto, Grey, and Bruce Railway Company for and upon the claim and cause of action in respect of which the said plaintiff was such creditor as aforesaid, and which judgment remained unsatisfied and unpaid; and the plaintiff further said the alleged claim or cause of action in respect of which the said judgment was recovered by the said Glover Harrison against the said Toronto, Grey, and Bruce Railway Company, was a pretended claim or cause of action, and was not a valid claim or cause of action against the said company, and the said company did not defend the action in which the said judgment was recovered against them by the said Glover Harrison, but suffered judgment therein to be recovered against them by default; and the said last mentioned judgment was had, devised and contrived of and by fraud and collusion, by and between the said Glover Harrison, the said Nathaniel Dickey, and the said company, to the end, purpose, and intent to delay, hinder, and defraud the now plaintiff and other creditors of the said company of their just actions and debts against the said company, and also of their just actions and debts against the now defendants as holders of the said shares in the capital stock of the said company; and the said last mentioned judgment, at the time of the recovery thereof, and at all times since, was, and still continued fraudulent and void as against the now plaintiff under and by virtue of the statute chaptered five, passed in the thirteenth year of the reign of Her Majesty Queen Elizabeth; and the defendants and the said Glover Harrison at all times had full notice and knowledge of all the facts and premises aforesaid; and the defendants did not defend the action in which the said judgment

recovered by the said Glover Harrison against the now defendants, as in said plea mentioned, was recovered, and the said last mentioned judgment was also had, devised and contrived of and by fraud and collusion by and between the said Glover Harrison and the now defendants, to the end, purpose, and intent to delay, hinder, and defraud the plaintiff of his just action and debt against the now defendants, as the holders of the said shares in the capital stock of the said company, and at the time of the recovery thereof, and at all times since, was fraudulent and void as against the plaintiff under and by virtue of the said statute.

The defendants joined issue upon these replications, and the case was tried before Cameron, J., at the last Toronto Winter Assizes, when it appeared that the plaintiff had recovered a judgment against the Toronto, Grey, and Bruce Railway Company for \$5,603.45 on the 15th day of August, 1877: that execution had been issued thereon and returned *nulla bona*, as in the declaration alleged: that the defendants were shareholders in the said Toronto, Grey, and Bruce Railway Company, and for the number of shares stated in the declaration, and that there was due thereon for principal the sum of \$1,800 and for interest \$540: that on the 27th day of January, 1876, a specially endorsed writ of summons was issued out of the Court of Common Pleas in the name of Glover Harrison, as plaintiff, against the said Toronto, Grey, and Bruce Railway Company, by J. K. Kerr, as attorney. The said writ was endorsed as follows:—"The following are the particulars of the plaintiff's claim: 2nd September, 1875, \$1,800, amount of account rendered by N. Dickey to the defendants, the said company, and admitted by the defendants to be correct, which said amount and claim has been assigned to the plaintiff." Service of this summons was accepted by Z. A. Lash, as attorney for the defendants, the railway company, and endorsed on the summons was this memorandum: "You cannot sign judgment for default of appearance on consent. We will appear; you must then declare and sign judgment for default of plea:" that an appearance was filed in accordance with the attorney's agreement: that

declaration was filed and served : that no plea was pleaded, and judgment was signed by default on the 17th February, A.D., 1876, for \$1,877.50 : that execution was issued on the said judgment on the said 17th day of February and returned by the sheriff of the county of York on the same day *nulla bona*, the plaintiff's attorney having applied to the sheriff for a return : that on the 18th day of February a writ of summons, specially endorsed, was issued by J. K. Kerr, on behalf of the said Glover Harrison, against the present defendants, endorsed as follows : "The following are the particulars of the plaintiff's claim \$1,800, being portion of amount of a judgment recovered by the plaintiffs against the Toronto, Grey, and Bruce Railway Company, and to recover which execution has been issued against the Toronto, Grey, and Bruce Railway Company, and returned *nulla bona*, which said amount is now owing and payable by the defendants to the said Toronto, Grey, and Bruce Railway Company for unpaid calls on stock held by them in the said Toronto, Grey, and Bruce Railway Company. This writ was served on James Isaac Dickey on the 18th, and on John Neill on the 21st day of February, 1876 ;" and judgment for default of appearance was entered for the said sum of \$1,800, without costs, on the 1st day of March, 1876. No execution was issued on this judgment. Messrs. Blake, Kerr, and Boyd were the regular solicitors and professional advisers of the defendants. They had not acted professionally for Glover Harrison before. The claim of the defendant Nathaniel Dickey against the Toronto, Grey, and Bruce Railway Company was as follows :

"TORONTO, 2nd September, 1871.

"The Toronto, Grey, and Bruce Railway Company in account with N. Dickey.

To services in the County of Bruce procuring	
bonuses, &c., 1868, '69 and '70.....	\$600 00
To services in the County of Grey.....	600 00
To " " County of Wellington.....	300 00
To " " Counties of Huron and Peel.	300 00

\$1800 00"

This claim was assigned to Glover Harrison on the 27th day of January, 1876, the same day on which the summons in his name was issued against the railway company, and was as follows: "Know all men by these presents, that whereas I, Nathaniel Dickey, am entitled to a certain sum of money from the Toronto, Grey, and Bruce Railway Company, and that I am indebted to Glover Harrison, hereinafter named; and whereas the said Glover Harrison, in consideration of my assigning my said claim to him, has agreed to release me from my said indebtedness, now these presents witness that in consideration of the foregoing and of the said release, I, the said Nathaniel Dickey, do hereby grant, transfer, assign and set over to the said Glover Harrison, his executors, administrators or assigns, all my claim against the Toronto, Grey, and Bruce Railway Company, and all my right, title and interest therein and thereto, and all rights and causes of action against them." Endorsed on this document, but not signed, was the following: "In consideration of the within I hereby release the said Nathaniel Dickey from the indebtedness therein referred to, dated 27th January, A.D. 1877."

Nothing appeared to have been done towards enforcing the judgment of Glover Harrison, recovered on the first day of March, 1876, and no proceedings were taken thereon; but on the 27th day of November, 1877, Messrs. Blake, Kerr, & Boyd, who held about \$20,000 for and on account of the defendant's firm, the proceeds of certain real estate of the firm, for the purpose of paying debts of the firm, which had been dissolved and was being wound up, gave their cheque of that date to Glover Harrison for \$1,800; expressed on its face to be in full of debt, *Harrison v. Dickey*. On the following day Glover Harrison repaid to the defendant, Nathaniel Dickey, \$1,673.63, his claim having only amounted to \$126.17, the sum repaid being the difference between the amount so due and the judgment recovered by Harrison against the company.

Glover Harrison, who was called as a witness, swore: "I was pressing my claim against Nathaniel Dickey for about

two years previous to the 28th of November, 1877, and Dickey told me he had a claim, or judgment, against the Toronto, Grey, and Bruce Railway—a judgment I guess it was. Dickey said he was not able to pay the amount, but would give me an assignment of the judgment. He gave me an assignment (above set out). I left the assignment in the office of Blake, Kerr, & Boyd, with Mr. Fletcher. He asked me who was my lawyer. I said I had not any lawyer whom I employed. I left it with Mr. Fletcher for collection. I afterwards saw them as to the proceedings being taken, but do not remember anything about it, more than Mr. Fletcher sending for me once or twice, and I received a cheque for the money, and paid back to Mr. Dickey by cheque the balance over my account of \$126.27. I sued for the purpose of deducting my account. I was entitled to deduct my own account from the claim; that is the purpose for which I got the claim. When I saw Mr. Fletcher I gave the instructions on my own behalf to collect the money. In the collection of it he was to act on my behalf.” In cross-examination he said: “I do not remember who drew the assignment of the claim to me. Mr. Fletcher and Mr. Muloch brought over some papers to me from the office, or I was sent for. They enquired what was owing to me. The idea was not that I was to get \$1,800 for releasing my claim; I was just to get my debt for it.”

There was evidence to shew that the services rendered by the defendant, Nathaniel Dickey, to the Toronto, Grey, and Bruce Railway Company, were rendered chiefly before the complete organization of the company, and without promise or undertaking on the part of the company that he should be compensated therefor.

The Judge found specially that the writ of *fieri facias* against the company was returned no goods; that the defendants did not satisfy the plaintiff's claim by payment before action; that the claim of Nathaniel Dickey against the Toronto, Grey, and Bruce Railway Company was not a claim that was recoverable in law; that Glover Harrison

sued on behalf of, and in the interest of, Nathaniel Dickey, the railway company, and that he had only a claim against Nathaniel Dickey for \$126.27, which he was paid, and that the assignment from Nathaniel Dickey to him of his claim against the company was for the purpose of relieving the defendants from liability to pay their stock ; and in accordance with what the learned Judge took to be the effect of the judgment on the demurrer to the second replication to the third plea, 42 U. C. R. 350, he entered a verdict for the plaintiff for \$2,3000, being unpaid stock \$1,800, and interest thereon \$540. He also found that the Board of Directors of the Toronto, Grey, and Bruce Railway Company, by a minute duly recorded, acknowledged the indebtedness of the company to the defendant, Nathaniel Dickey, to the amount of \$1,800.

In Hilary Term, February 6th, 1879, *J. K. Kerr*, Q. C., obtained a rule *nisi* to shew cause why the verdict for the plaintiff should not be set aside, and a verdict entered for the defendants pursuant to the Common Law Procedure Act, or why the verdict should not be reduced by the amount of \$540, interest, or the sum of \$126.27, Glover Harrison's claim.

In Easter Term, May 29th, 1879, *Proctor* shewed cause, and contended that Glover Harrison was only an agent and trustee for the defendant Nathaniel Dickey, and the assignment was not *bona fide*, but designed to enable the defendants to escape payment of their stock : that the payment by the cheque of Messrs. Blake, Kerr & Boyd was in fact a payment by Nathaniel Dickey alone, and was not authorized by the firm : that the firm could not be relieved of its liability to execution creditors of the company by the payment of a judgment debt, even if *bona fide* due by the company to one of the firm. He cited in support of his contention *Scales v. Irwin*, 34 U. C. R. 545 ; *Moore et al. v. McKinnon*, 21 U. C. R. 140 ; *Benner v. Currie*, 36 U. C. R. 411 ; *McGregor v. Currie*, 26 C. P. 55 ; *Moore v. Gurney*, 21 U. C. R. 127 ; *Nasmith v. Dickey*, 42

U. C. R. 355. He referred to the endorsement on the writ of summons by the attorney, that judgment could not be signed for want of an appearance, as strong evidence of collusion between the company and defendants.

Kerr, Q. C., contra, contended that Nathaniel Dickey must be regarded as a stranger to the firm, as far as his claim against the company was concerned, and a stranger would have been entitled to sue the company and be paid his judgment: that though the payment was not made till after plaintiff commenced suit, the judgment had been recovered, and defendants were entitled to relieve themselves by payment and to prefer any creditor of the company suing them they pleased: that Nathaniel Dickey's claim was one that the company might justly and lawfully pay, whether he could recover against them by suit or not: that the company had, by the minutes of the board of directors, duly passed, rectified, and adopted the liability, and the plaintiff could not dispute their right to do so: *Spiller v. Paris Skating Rink Co.*, L. R. 7 Chy. D. 368; *In re British Farmers' Pure Linseed Cake Co.*, L. R. 7 Chy. D. 533; *Kipley v. Todd*, L. R. 3 C. P. D. 358; *Spar-goe's Case*, L. R. 8 Chy. App. 407; *Dent's Case*, L. R. 8 Chy. App. 768; *Poole, Jackson & White's Case*, L. R. 9 Chy. D. 322. The verdict under any circumstances should be reduced by the amount of interest, as a shareholder under ch. 169 R. S. O. sec. 30, is only liable to a creditor of the company for the amount unpaid on the stock, and not for interest accrued thereon, and the provision with respect to the seizure and sale by the sheriff of stock under execution, ch. 66 R. S. O. sec. 21, does not apply to an action by a creditor of the company, and the difference in the two provisions shews that the Legislature intended interest in the one case to be recovered and not in the other.

August 30th, 1879. HAGARTY, C. J.—The defendants, a business firm in Toronto, became stockholders in this company, and a large amount was unpaid on their stock.

The question before us is, whether they have in effect paid it up on the facts in evidence.

In substance the defence amounts to this, that the stock has been paid up by the settlement of a claim of one of the partners, N. Dickey, against the company in his individual capacity.

N. Dickey claims about \$1,800 from the company. He owed G. Harrison about \$125 on private account. He was in good credit and quite able to pay that amount if insisted on. He assigns over his claim against the company to Harrison by a writing which on its face was absolute as to the whole amount, and the consideration was declared to be that Harrison releases him from the counter claim. But the evidence of both assignor and assignee was clear that the true bargain was that Harrison, after paying himself his claim, about one-fifteenth of the whole amount assigned, should account to the assignor for the residue.

We fully agree with the finding of the learned Judge, that this assignment was for the purpose of relieving the defendants from liability to pay up their stock, and that Harrison sued the company, and afterwards the defendants, in the interest of N. Dickey, and to carry out this purpose.

On this evidence we can hardly hold such an assignment to be under the statute in the ordinary sense. The action must be looked upon as the action of Nathaniel Dickey, brought by his solicitors at his instigation.

The company is then in a state in which *nulla bona* is the inevitable return to an execution against them.

This is the answer to the execution obtained in Harrison's name for Nathaniel Dickey's benefit. He then at once sues the present defendants under the statute, or, in other words, Nathaniel Dickey, as a judgment creditor of the company, sues himself and his co-partners for the amount of this unpaid stock, and obtains judgment (March, 1876).

Before anything is attempted to be realized on this judgment, the present plaintiff Nasmyth, an ordinary creditor, obtains a judgment against the company (August, 1877).

This action was commenced by *sci. fa.*, and tested 24th October, 1877. Defendants appeared and a plea was filed on the 29th November, 1877.

On the 27th November, 1877, while this suit is pending, the defendants' attorneys, out of the proceeds of certain real estate of the firm in their hands, went through the form of giving their cheque to Glover Harrison for \$1,800, amount of his judgment, and next day he hands back the same amount, less his small claim of \$127 against Nathaniel Dickey.

It is impossible to look upon this transaction as any thing except a device on the defendants' part, or rather on Nathaniel Dickey's part, to have the amount unpaid on their stock applied to satisfy Nathaniel Dickey's claim on the company, instead of paying plaintiff's judgment. A judgment obtained as that of Harrison's, is well described in the Court of Appeal, in *Girdlestone v. Brighton Aquarium Company*, L. R. 4 Ex. Div. 108. To an action for penalties, a prior judgment by one Rolfe for penalties for the same offence was pleaded. Defendant's solicitors had asked Rolfe to allow his name to be used in bringing the action, and Rolfe had taken no active part in it.

Brett, L. J., says: "The defendants' solicitor asked Rolfe to allow him, the defendants' solicitor, to bring an action against the defendants, using Rolfe's name, and the supposed plaintiff did not exercise any judgment upon the action. He did not become liable to any body for what was done. He did not know of the course of the action; he did not in fact, so far as I see, know whether the action was brought or not, &c. It shews to my mind that Rolfe never was a plaintiff, and that the only plaintiff in the suit was the defendants' company. Therefore, the defendants' company were the plaintiffs in that suit, and they were also the defendants; therefore the judgment recovered in form was no judgment—no judgment which can be said to have been recovered by a third party." He considered that there was no fraud, covin, or collusion, but that it was an inoperative judgment.

Cotton and Thesiger, L. JJ., went further, and held that such a judgment was obtained in the eye of the law by covin and collusion.

There is not much distinction between that judgment and Harrison's, except that the latter had a small personal claim against Nathaniel Dickey for about one-fifteenth of the amount.

But we cannot, I think, hold that even as to this small claim Harrison was a *bona fide* plaintiff.

He recovers judgment against three defendants in March, 1876, and makes no attempt to enforce it for 19 months, and till after this action was brought, and all that time his small claim could have been enforced if he pleased.

We must look upon his nominal suits as wholly the suits of Nathaniel Dickey, first, against his own company, and secondly, against his co-partners in business.

According to the evidence his co-partners do not seem to have been anxious or even willing to have their funds in their solicitors' hands applied to pay N. Dickey's individual claim on the railway company, which, at the best, was of a most doubtful character, for services in getting up the company, and involving loss of time and service which they might perhaps regard as belonging to their own extensive business. They say that, as between the members of the firm, which is now dissolved, this item of \$1,800, paid by the solicitors out of the assets of the firm in their hands, remains in abeyance.

N. Dickey admits that this item is still in abeyance between them. Neill says he never authorized the payment to be made. Isaac Dickey says the same in substance, and that he considers if N. Dickey got anything for his services to the railway it should go to the firm.

I have always considered that the unpaid stock was the fund or asset to which the general creditors of the company have the right to look; that this proceeding by an outside creditor is, (in Lord Blackburne's language) as it were, an extended execution against the company's assets, and that to allow the claim of one of the stockholders or joint adventurers in a limited company against his own company to be in effect an offset against the outside creditor's claim, is to violate the clear and honest

rule, that until all other creditors are paid in full there can be no proof by one partner or joint adventurer against his co-partners.

For the purpose of this suit it is not necessary to dispute Mr. N. Dickey's right to recover his claim from the company, and to be paid by them in the ordinary way. All that concerns our decision is, that he cannot be permitted to withdraw from the general creditors the amount of the unpaid stock of himself and his co-partners to pay his private claim, thus depriving the plaintiff of the only fund which the Legislature has made applicable to pay his claim.

As regards the public, these defendants enjoy a limited instead of an unlimited liability in this trading corporation.

I think that *Smart v. MacBeth*, the first case we had on this point, was rightly decided.

Shortly following it was the Privy Council decision in *Ryland v. Delisle*, L. R. 3 P. C. 17. We then have *McGregor v. Currie*, 26 C. P. 55; *Benner v. Currie*, 36 U. C. R. 411.

On the principles of these cases I think the present plaintiff is entitled to our judgment, on the ground that the stock has not been paid up, and that the amount unpaid must go to the plaintiff as judgment creditor.

We may give the defendants the benefit of assuming that judgment was rightly obtained by Mr. N. Dickey (in Harrison's name) against the company; but the case is certainly open to the remark that the law would seem to be defective if it would allow the resort of an ordinary judgment creditor to the only available asset of the company, viz., the unpaid stock, to be defeated by applying such asset to the payment to the stockholder of a claim for services such as he gave in the promotion of the company and in inducing municipalities to subscribe for its stock.

I do not think the judgment creditor can recover interest due on the unpaid calls. I do not think he stands in the same position in the company, but can only have recourse

to the amount of unpaid stock, whether the same has or has not been called in; but my learned brothers think differently, and judgment must be for interest also.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

BACKUS v. SMITH.

Lateral support of house by adjoining soil—Implied reservation of by grantor—Unity of seisin—Easement—Prescription—Land weighted with buildings—Damages.

Plaintiff, tenant for years, sued for injury to his stock-in-trade, caused by his wall falling from defendant's excavation on an adjoining lot. The wall was over twenty years old, but there had been unity of seisin of both lots for a year, about the middle of the period. Then plaintiff's landlord sold defendant's lot in fee.

Held, that no easement had been acquired by lapse of time.

Held, also, CAMERON, J., diss., that there was evidence of negligence in fact, causing damage, and that plaintiff could therefore recover, irrespective of any acquired easement.

Held, also, that lateral support to land in its natural state is a right of property; that right to support for buildings is an easement; and that such an easement is not within the Prescription Act.

Quære, whether, on the authorities, the landlord, when he conveyed defendant's lot, did, by implication of law, reserve the right of support to his then existing wall, and grantee thereby assented to such reservation. Remarks on the law as to damages, where the land is weighted with buildings.

Per CAMERON, J., that the evidence did not disclose negligence, entitling plaintiff to recover.

THE first count of the declaration stated that plaintiff was tenant in possession of a building in Chatham, part of lot letter A on King street, which he used as a harness shop: that defendant Eliza was the owner in fee, and defendant John her husband and agent; and that defendant Houston was owner of another part of A, adjacent to plaintiff's land, and plaintiff was entitled of right to the support of all parts of the building of which his tenement formed part, and of the walls and foundation thereof, and of the subjacent and adjacent soil and ground under and adjoining said tenement; yet defendant wrongfully excavated

on the adjacent and subjacent land to said tenement, and near and under the soil forming the support to the walls of said building, which supported said shop and tenement, and loosened, disturbed, and removed large portions of the other soil so adjacent and subjacent, &c., near to the support and foundation, &c. ; and carelessly, negligently, and improperly dug, took down, pulled, and removed said subjacent and adjacent soil, and negligently took no step to shore up plaintiff's building or take other reasonable precautions to support same, &c., &c. ; by means whereof the foundation of plaintiff's tenement was loosened, weakened, and suddenly gave way and fell in on plaintiff's stock in trade, injuring and destroying same : averment of damage and loss of use of tenement for residue of his term.

The second count was to the same effect, but in a more concise form, charging that it was done without notice to plaintiff.

Pleas by Houston : 1. That Eliza Smith was not the owner.

2. That plaintiff was not entitled to the support claimed from the adjacent or subjacent soil of his (Houston's) land.

3. To the second count, that plaintiff had notice.

4. Not guilty.

5. That plaintiff was not the tenant.

6. Denial of duty to shore up, &c.

7. Accord and satisfaction by Eliza Smith.

There were somewhat similar pleas by defendants Smith, unnecessary to be noticed.

Issue.

The trial took place at Chatham, at the last Fall Assizes, before Armour, J., without a jury.

It appeared that the building in question was over twenty years old.

The plaintiff was tenant to the defendant Eliza Smith for a term of years from 1873. He had a harness shop. The defendant Houston owned the adjoining lot on the east.

The defendant John Smith was originally a tenant of Eberts, owner of the fee. In 1860 he purchased in fee from Eberts.

The lot was in 1873 conveyed to his wife, and the plaintiff was her lessee.

Houston and others on the east wished to build a uniform set of buildings, and made an arrangement with John Smith, acting for his wife. Houston was to build a wall, partly on Smith's lot, which was to serve as a party wall, with a view to further building. The wall of the plaintiff's house was six inches within the line. In addition Smith was to cut four inches off his wall in order to make room for the party wall. Smith's wall (of two story house) was a foot thick, and rested merely on an oak plank laid about a foot below the surface.

It would have been necessary to underpin this wall in excavating Houston's cellar. The work was apparently done by the joint action of Smith and Houston through one Jones.

It seemed reasonably clear on the evidence that the excavation was done without due care, and no proper steps were taken to shore up and underpin the plaintiff's wall. The excavation for the cellar was completed to the required depth of seven feet, on the side next to the plaintiff on Thursday, the 8th of June, and on the Saturday, two days after, the earth next to the plaintiff's house gave way, and the house fell, doing the plaintiff, the tenant, considerable damage to his stock-in-trade, for which the action was brought.

The plaintiff claimed that an easement had been acquired by twenty years' occupation. To this it was answered that it was destroyed by unity of possession.

On this latter point it appeared that on the 22nd of June, 1870, the Houston lot was conveyed by bargain and sale in fee to John Smith.

On the 16th of July, 1870, Smith and his wife mortgaged the lot to William Simonton to secure \$1,600.

On the 3rd of May, 1871, Smith and wife conveyed to Elizabeth J. Higgins.

On the 18th July, 1871, Mrs. Higgins and husband mortgaged to William Simonton for \$2,500.

On the 13th of April, 1872, Simonton released the mortgage made by Smith to him of the 10th July, 1870.

The conveyance of Higgins and wife to Smith was in the ordinary form of deed in fee under the short form, with the usual covenants. The consideration expressed was \$3,000, and other lands were included in it.

The mortgage given by Smith to Simonton was in the usual form, with his covenants to pay, and his wife Eliza barred her dower.

The conveyance by Smith to Mrs. Higgins contained covenants against the grantor's acts, specially excepting the mortgage to Simonton.

In his evidence at the trial Smith stated that he held the Houston lot for Higgins: he was asked to do so: that he had a small interest in it, as Higgins was indebted to him: that he took it to mortgage it and convey it to Higgins's wife, so as to protect it from Higgins's debt.

It was argued for the defence that the tenant could not maintain this action, as his landlord was an assenting party to the excavation, and that he was joined with Houston as a defendant.

The learned Judge considered the case made out as against Houston, but not as to the Smiths, and a verdict was accordingly entered for the plaintiff against the defendant Houston for \$400, and in favour of the other defendants, with certificate that there was reasonable cause for joining them as defendants.

In Michaelmas Term last, 20th November, 1878, *Robinson*, Q.C., obtained a rule *nisi* to enter a verdict for the defendant Houston.

In Hilary Term last, 12th February, 1879, *C. R. Atkinson* shewed cause. The title of each party is admitted, viz., that Houston owned the land east of the land of Eliza Smith, and that the plaintiff was tenant in possession, under an existing lease for a term of years, of Eliza Smith, of the shop on the ground floor, and on the east side of the building on the lands of Eliza Smith, which lie adjacent and

west of Houston's lands ; and that Eliza Smith owned that land and building, and had a right to lease. It is not disputed, at all events the evidence clearly shews, that the building fell down in consequence of the negligence of the defendant's contractor in excavating too near the wall of the Smiths' building before any attempt was made to shore up the building, or to put under piers to support the wall. It is clearly shewn by the evidence that Houston, Adams, and Young, owners of lands east of the building, had agreed to put a block of buildings on their lands, and had contracted with the builder to erect them. It was proposed to give him the contract for excavating the cellars and foundations, but Adams objecting to the price, the contract was given by Young to one Jones for \$100, to which Houston agreed ; in fact, Young said he was authorized by both Houston and Adams to let the same, Jones then becoming the workman and contractor of Houston for the excavation to be done on his land. It also appears in evidence that the defendants, Houston, and the Smiths, the owners of the building, &c., entered into an agreement for the excavation of traverses, the building of sufficient piers under the wall of Smith's building to support the same, and to erect on the true line between them a new party wall, half of the cost of which was to be paid by Smith to Houston after the same was finished ; and thereupon the builder William Smith was employed by Houston to put in said piers, and to erect as part of the said building said party wall. It also appears that the defendants were advised, in excavating the said cellar, that till the piers were put under the wall of Smith's building no excavation should be made nearer on the surface from said building than four feet, with a batter downwards of six feet at the bottom of the excavation ; and that so soon as that was done, if traverses were excavated at intervals along the slope under the building, and as excavated piers put in, there would be no danger ; so that Houston knew what was necessary to be done, and, as he says, entered into a contract with the builder Smith to put in said piers. He

and Young say that the builder Smith agreed to superintend the excavation by Jones, and to cut out the traverses, Jones carting away the soil. Smith denies that he agreed to superintend Jones's work, and as he received nothing for it and was underbid by Jones, his is the most likely story; at any rate, he and Jones were severally employed by Houston to do all the excavations and put in the piers, and must be liable for all acts, omissions, or neglects in the performance of their contracts on Houston's land, and he is liable for all damages arising thereby. Had the excavation of the cellar and traverses been properly attended to the mischief done would have been avoided, and it was Houston's duty to see that they were properly done, and he cannot shield himself behind either Jones or Smith. The maxim, "*Qui facit per alium facit per se*" applies. See *Bower v. Peate*, L. R. 1 Q. B. D. 321; *Wheelhouse v. Darch*, 28 C. P. 269, and the cases cited and commented on there. On the questions arising as to the right to lateral support from Houston's land, there is an apparent direct conflict of authority in our own and the English Courts. In *Wheelhouse v. Darch* it was held that twenty years user gave a right to lateral support, while in *Angus v. Dalton*, L. R. 3 Q. B. Div. 85, the Court, Lush, J., dissenting, held that twenty or more years user would not of itself give this right. It is now said that in Appeal *Angus v. Dalton* has been reversed; but if so it is not yet reported. *Wheelhouse v. Darch* is an unreversed decision of one of our own Courts, and this Court will follow it rather than the English case, in which the Court was divided. See also, in support of the plaintiff's right to support, *Ronomi v. Backhouse*, E. B. & E. 622, and the cases and works cited and commented on in the above cited cases. Conceding that twenty years user gives the right, it appears in evidence that the building was erected, in 1854, on land leased, with right of purchase by John Smith from William D. Eberts, owner in fee. Smith says, "Prior to my obtaining title from Eberts, I had possession of it for five or six years, &c., by lease. I occupied it. There was the lease

and an agreement for purchase. I occupied it for some years before the lease was executed, as owner. I had a ten years lease and then bought it." He was afterwards recalled by defendant to contradict his evidence first given, and then stated his lease gave no right of purchase; that it was a verbal lease, with right to remove buildings; but it is not probable that a valuable brick house would be erected by him on a verbal lease on such terms; and his first evidence, it is submitted, is the most reliable. The deed from Eberts to J. Smith is dated January 2nd, 1860, by which the fee became vested in him and through him in the defendant Eliza Smith, the building being erected with the consent of the owner Eberts, the lessor, who sold thereafter to Smith, shows over twenty years user of this lateral support. It was urged at the trial that as J. Smith, while holding the fee simple of the land, also became owner in fee of the adjacent land now owned by Houston, this unity of possession of itself destroyed any right to support. Unity of possession does not destroy a prescriptive right or easement of this nature. It is only that class of easements that may be instanced as the right to a pathway across other land, or the use of a well on a neighbour's premises. It was urged also that by the conveyance back to Elizabeth Higgins of the Houston land, the title became severed and the right to support thereby destroyed, as he conveyed away that right to her; but it is submitted that in such conveyance there was an implied reservation of the right to lateral support. It has been held where A. conveyed to B. a house and land adjacent to other land owned by him, although the conveyance is silent on the point, yet that there is an implied conveyance of a right to support from the adjacent land to said building, and the same principle should surely govern the converse position. See *Dugdale v. Robertson*, 3 K. & J. 695; *Caledonia R. W. Co. v. Sprot* 2 Sch. App. 449; *Richards v. Rose*, 9 Ex. 220; *North Eastern R. W. Co. v. Elliott*, 2 DeG. F. & J. 430, S. C., 10 House Lords, 333; *Gale on Easements*, 117, 378-9.

Houston is liable, on the ground of acquiescence in a right to support for said building, having acknowledged a right by his negotiations with John Smith, and by his contracting to put in the piers and erect the party wall. His whole conduct in dealing with the Smiths before the fall of the building, is inconsistent with his denial of the right in this suit.

Robinson, Q. C., contra. This is the case of a tenant who sues and is asserting a prescriptive right against his landlord, one of the defendants being such landlord. Can he do this? His landlord was a party to the building of the wall, and the Judge at the trial said he was so far a party to the act that he could not recover, because his tenants could not sue for a prescriptive right. Then again, prescriptive rights can only be obtained by fee owners, whereas Smith was only a tenant until 1860. See *Godard*, 2nd Ed. 11, 154, 142; *Taylor, L. & T. Am. ed. sec. 243.*

On the question of negligence, see *Jeffreys v. Williams*, 5 Ex. 800, per Parke, B.; *Gayford v. Nicholls*, 9 Ex. 702; *Gale on Easements*, last ed. 446, 376, 380; *Humphries v. Brogden*, 12 Q. B. 739; *Dodd v. Holme*, 1 A. & E. 493; *Wharton on Negligence*, 2nd ed. secs. 928-930; *Shearman v. Red.* 3rd. ed. secs. 496, 497; *Kent's Com.* 12th ed. 437; *Brown v. Windsor*, 1 Cr. & J. 20. There was no intention to be negligent, and there was evidence that a good many others would have done the same thing. *Bower v. Peate*, L. R. 1 Q. B. D. 321.

30th August, 1879. HAGARTY, C. J.—We see no reason why the tenant for years cannot maintain an action like this immediately affecting his possessory rights.

The only recovery he is here upholding is that against Houston as a wrongdoer.

The landlord brought a previous action for this excavation, but failed in it.

The learned Judge has found that the work here was done in a negligent manner and without proper care or precaution against damage to the building. It is unneces-

sary to enter into a discussion as to whether the landlord would be responsible in this suit, as the verdict is in her favour.

The law as to lateral support of buildings is at present in a most confused and unsatisfactory state, and until *Angus v. Dalton* has been disposed of in the House of Lords it will not be easy to speak with much legal certainty.

The report of the case in the Court of Appeal is an elaborate review of the authorities, resulting in a divided opinion, as in the Queen's Bench, L. R. 4 Q. B. Div. 162.

So far as applicable to this case, we should of course follow the decision of the majority of the Lords Justices.

Certain propositions seem, at all events, to be agreed on:

1st. That it is a natural right of property, by which a man is entitled to have his soil (in its natural state) supported laterally by his neighbour's soil (p. 169).

2nd. That the right to lateral support from the adjacent soil (p. 203) for buildings, in addition to the support necessary for the soil, is not a right of property, but an easement which may be acquired by prescription from the time of legal memory, or by grant, express or implied, and is not within the Prescription Act.

Lord Justice Brett (p. 203) puts it with much clearness as "a negative easement, by which the land of the adjacent owner is burdened with a servitude; that it cannot be so used as to deprive the building of the adjacent owner of the support acquired by virtue of the easement, unless an equivalent support is supplied; that such an easement might be given at once by express grant of the owner of the servient property, and the servitude so imposed would pass with the land."

If it be necessary in the present case to establish a clear enjoyment for over twenty years of the lateral support, I see much difficulty in plaintiff's way.

Is there evidence from which a Judge could tell the jury that they would be justified in holding there was a grant?

The relation of dominant and servient tenement did not exist uninterrupted for twenty years. For nearly a year,

about 1870, there was a unity of ownership in the two tenements. During that time it could hardly be said that defendant's lot was servient to plaintiff's lot, or that when such unity took place any easement had been acquired. In this the case differs from those in which, after the expiration of over twenty years, or the acquisition of the right of support, the unity had taken place.

I am not concerned to discuss whether Smith, during that period, was beneficially seised of defendant's lot, or holding it merely to protect it from creditors. On the face of the conveyance he was absolute owner, and executed a mortgage, with personal covenants, for a large sum.

Gale on Easements (Ed. 1868), p. 133: "It appears, however, to be more correct, as well as more in accordance with the general principles of the law of easements, as recognized both by the English and civil law, to consider all easements, whether of convenience or necessity, as extinguished by unity, but that upon any subsequent severance, easements which, previous to such unity, were easements of necessity, are impliedly granted anew in the same manner as any other easement which would be held by law to pass as incident to the grant." * * "In none of the numerous cases has it been laid down that the *same* right revived upon the severance of the tenements which existed previous to the unity." * * "It is clearly settled on all the authorities that during the unity no way or easement can exist in the land."

Goddard (1877), p. 366, recognizes the principle, pointing out the distinction where the estates are of different kinds.

At p. 157: "An interruption may occur in the enjoyment of an easement *as an easement*—that is, the user may continue in point of fact, but it may be changed in character, as, for instance, it may become one of the rights of ownership, if a union of ownership should take place. * * At common law such an interruption would negative the presumption of a grant, for if a grant had originally been made the right granted would be lost or merged when the grantee acquired the soil of the servient tenement. On

severance of the dominant and servient tenements the easement could only be re-created by a fresh grant, and this would be inconsistent with the idea that the easement was created by a grant before the time of legal memory." * *

* * "Under the Act unity of ownership operates as an interruption, which will prevent a prescriptive title being gained, for during the union the claimant does not enjoy as of right the easement, but the soil itself."

I have examined the authorities referred to in these statements, and I think they fully support them. See such cases as *Bright v Walker*, 1 C. M. & R. 219, and *Battishill v. Reed*, 18 C. B., at p. 703.

The law as to extinguishment and suspension by unity of seisin is fully discussed in *Thomas v. Thomas*, 2 C. M. & R. 37; *James v. Plant*, 4 A. & E. 749. Where the estates are not of the same extent the easement may be only suspended till the determination of the lesser estate.

It is pointed out in *Angus v. Dalton* (at p. 181) that it is still a question whether the right of support is absolute when the house has stood the requisite time, or whether there is any limitation to the right. Thesiger, L. J., considers that a user which is secret raises no presumption of acquiescence on the part of the servient owner. "If, therefore, a particular house were, by reason of some intrinsic or extrinsic weakness of a serious character, or owing to some unreasonable method of construction, to require an amount of support greater than houses of its kind usually require, I think the mere enjoyment in fact of that extra support would not raise the presumption of acquiescence on the part of the servient owner, or create after twenty years user a right to that extra support."

Cotton, L. J., appears to take the same view, p. 187: "Twenty years enjoyment of lateral support only gives a right to such support as the actual construction of the house, if known to the adjoining owner, requires. * * There was no evidence that the owner of the adjoining house knew of the particular construction of plaintiff's house, and in my opinion the question ought to have been left to

the jury to find whether the support required for plaintiff's house was more than was reasonably required by a house of the apparent dimensions and character of plaintiff's house." See also *Gale*, 354.

The language should be borne in mind in reference to the facts of the present case.

It appears that the wall of plaintiff's house, (two stories high), rested merely on an oak plank laid about a foot under the surface of the earth, without any stone or brick foundation. It was suggested that it was "made land," and not the soil in its natural state under plaintiff's wall. This might be important to consider also on the question of negligence in making the excavation.

The plaintiff's case has also to be viewed in this light—that when Smith sold defendant's lot to Higgins, he impliedly reserved the right of support for his own wall.

Richards v. Rose, 9 Ex. 218, is the chief authority. There it was held that where several houses belonging to the same owner are built together, so that each requires the mutual support of the next house, and the owner parts with one of the houses, the right to such mutual support is not thereby lost, the legal presumption being that the owner reserves to himself such right, and at the same time grants to the new owner an equal right, and that the right is independent of priority of title. The remarks of Parke, B., and Pollock, C. B., may be noted. The latter says: "Where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is either, by a presumed grant or by a presumed reservation, a right to such mutual support, &c."

On this case it is remarked in *Gale*, p. 95, (ed. 1868): "*Richards v. Rose* is not an authority for an implied reservation or grant by the purchaser of a right of support on a conveyance of a house in fee. The right there was claimed by one leaseholder against another, both claiming under the same freeholder, and in case of a lease the lessee has, generally speaking, no right to alter the tenement

leased. * * It may be doubted whether, in a conveyance in fee simple, any reservation of an easement can be implied for the benefit of other property of the grantor: the maxim that a man shall not derogate from his own grant, from which is implied the grant of an easement necessary or useful for the enjoyment of the property granted, does not favour the implication of a grant by the grantee of an easement over the land granted." See also *Gale*, 113, 114, 352, 357.

In *Murchie v. Black*, 19 C. B. N. S. 190, one Graham had sold several building lots on certain conditions. The defendant bought No. 6, and a few days after the plaintiff bought No. 7. The defendant was bound to build under the conditions. There was an ancient wall on plaintiff's No. 7, which plaintiff raised. The defendant, without negligence, excavated for building in No. 7, and plaintiff's wall fell. Erle, C. J., says: "The plaintiff stands in the same position precisely as if his lot 7 had remained in the vendor. If there had been a simple conveyance to the defendant of lot 6, lot 7 would have been entitled to support as well at law as in equity, according to the series of authorities cited by Mr. James. * * But here the vendor, being the owner of both lots, sells lot 6 to defendant, and according to the terms of the contract by which it is conveyed to him, he makes it obligatory on him to do, or at all events, within the provision of that contract he was only doing, his duty to his vendor when he did the act which brought down the plaintiff's house."

See also *Aspden v. Seddon*, L. R. 1 Ex. Div. 496. The language of Bramwell, B., seems to favour the same view of the effect of the disposition by the owner of two tenements, though the point as to the grantee accepting her land subject to an easement by mere implication of law does not expressly arise.

In *Suffield v. Brown*, 9 L. T. N. S. 627, Lord Westbury discusses the law very fully and forcibly, and although his dissent from *Pyer v. Carter* has not been followed, but the latter case fully vindicated and upheld (see *Watts v.*

Kelson, L. R. 6 Chy. App. 166), yet his remarks on the general law have much force in a case like that before us.

Sprot v. Caledonia Railway Co., 2 McQueen Sc. App. 449, is to the effect that a person granting a part of his land is prevented from so dealing with that which he retains as to cause that which he has granted to sink or fall. (p. 451).

To the same effect in substance is *Elliot v. North Eastern Railway Co.*, 10 H. L. 333. The grantor of land for a railway was held to convey the land to the company, together with a right to all reasonable subjacent and adjacent support, a right to such support being a right necessarily connected with the subject matter of the grant. (p. 356). The judgment appealed from, of Wood, V. C., is in 1 J. & H., and at p. 153 the same principle is stated as against the grantor.

In *Dugdale v. Robertson*, 3 K. & J. 700, the same learned Judge says: "Where minerals are demised and the surface is retained by lessor, there arises a *prima facie* inference at common law, upon every demise of minerals or other subjacent strata, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support, as in the case put in the House of Lords, 2 McQueen 449, of the demise of the upper part of a house. If I demise to you the lower story of a house and reserve to myself an upper story, the presumption is that I do not part with my right to be supported by the story I demise."

In *Watts v. Kelson*, L. R. 6 Chy. Ap. 166, the Lords Justices fully approve of *Pyer v. Carter* as sound law, notwithstanding Lord Westbury's adverse criticism. They held that a continuous easement (as a water course) to a property conveyed passed by implication.

Mellish, L. J., quotes approvingly C. J. Erle's language in *Polden v. Bastard*, L. R. 1 Q. B. 156: "There is a distinction between easements, such as a right of way or easement used from time to time, and easements of necessity, or continuous easements. The cases recognize this distinction,

and it is clear law that upon a severance of tenements easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant." He adds: "Here there was an actual construction on the servient tenement extending to the dominant tenement, by which water was continuously brought through the servient tenement to the dominant for the use of the dominant tenement;" and he holds that the right to such an easement would pass without any words of grant.

Most of the cases rest on the implication of law, that certain rights or easements are granted with the land conveyed. Here the proposition is as to what is impliedly reserved by a grantor. Mr. *Goddard's* book (1877), p. 187, does not discuss the point beyond saying: "In every case where an owner of adjoining houses or land severs the property by sale, rights of support are granted by implication by the vendors and purchasers respectively, for the preservation of the building belongs to each other." Citing *Richards v. Richards*, *Murchie v. Black*, and *Aspden v. Seddon*.

These seem to be the principal authorities on this not very clear question, and their perusal leaves my mind in a state of much doubt.

I hesitate to draw a clear inference that a grant in fee simple—fettered by no reservations—necessarily imposes on the land granted the servitude of supporting the adjoining wall of the grantor, no easement, as such, being in existence at the time of the grant.

An implication of law, arising from a transaction in which neither of the parties, men of ordinary intelligence and honesty, would not naturally imagine that such would be a legal result, does not rest on a very satisfactory basis. If I rightly understand the argument, the effect is, that if a man buy a piece of ground in a city, (almost always for building purposes,) and a wall only five or six years old may adjoin, the law adds a term to his apparently absolute fee simple right, that his land must uphold the wall if it turn out the two lots once belonged to one vendor, who

built the wall before severance, and each lot may have passed through many hands before reaching the vendee on whom the servitude is fixed.

In *Murchie v. Black* the defendant so situated escaped, because he was bound by his contract of purchase to build. When the defendant in the present case bought, or where any man buys a small town lot on a street, the law might naturally imply, or the parties themselves might be safely held to contemplate, that the vendee designed to build, or bought for building purposes.

I prefer, if possible, to decide the case on some clear ground.

It remains to consider the question of negligence.

The right of support to the soil in its natural state is a right of property. If defendant's excavation would have caused the soil to fall in without being weighted by buildings, the law seems clear that the damage to buildings may also be recovered.

Brown v. Robins, 4 H. & N. 186, is direct authority on this point. It refers to another case in which Creswell, J., asked the jury whether the land would have fallen in if houses had not been built upon it—whether, in fact, they thought the weight of the houses had in any way caused the sinking of the ground, which was caused by the defendant's mining operations. The jury found that the land would have sunk whether the houses were there or not; on which the learned Judge told them the plaintiff was entitled to damages to the extent of the injury to the houses.

Hamer v. Knowles, 6 H. & N. 454, is to the same effect. Pollock, C. B., says, at p. 465: "We think if the buildings being there did not contribute to the subsidence (as the arbitrator finds), the plaintiff is entitled to damages for injury to them through the defendant's wrongful act in causing the land to subside." This was held in answer to the argument that the buildings were not ancient.

See also *Gale*, 352, *Goddard*, 37, 322, *et seq.*, where the law is very fully discussed; and again at p. 308.

In these cases the injury was caused by mining and the sinking of the ground.

It is not very easy to say in the case before us whether the defendants' acts would have caused the soil in its natural state, unweighted by the building, to fall in. This must be found as a fact by the jury, or by the Judge sitting without a jury.

In the absence of any such express finding, I feel much difficulty in disposing of the case.

Smith v. Thackerah, L. R. 1 C. P. 566, seems worthy of note. The defendant dug a well near the plaintiff's land, which sank in consequence, and a building erected on it within twenty paces fell. It was proved that if the building had not been there the land would still have sunk, but the damage would have been inappreciable.

Erle, C. J., says: "For a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbour; and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount. * * The jury have found they did no sensible damage to the plaintiff, and he has therefore no right of action."

See the comments on this in *Goddard*, 272, 323, 388. It is also stated as law in *Gale*, 337.

The damage to the plaintiff in the present case arose wholly from the fall of the building of which he was tenant. Unless the building had acquired the right to support, it is not easy to see any appreciable damage that could have resulted to the plaintiff from the adjoining excavation. The evidence shews that in no place did the defendants' excavation come nearer than six inches of the site of the wall.

On this evidence, I would feel constrained to find that there was no appreciable damage done to the soil in its natural state.

It remains to consider whether this was actual negligence in the excavation of this work, irrespective of any acquired easement or right to lateral support.

Gale, 364, notes the misapprehension existing between negligence in fact and in law. Negligence in law would be where there was a legal right invaded, as of lateral support. Then an action lies, no matter how carefully the act is done. It is by no means clear that, where a party is not bound by any easement, that he may not be liable for damages resulting from negligence in fact.

Lord Tenterden directed, in *Walters v. Pfeil*, 1 M. & M. 362, where there was no easement, "If therefore you think that the house of defendant was pulled down in a wasteful, negligent, and imprudent manner, so as to occasion greater work to plaintiff than in the ordinary course of doing the work they would have incurred, then I think defendant liable to make compensation for the consequences of his want of caution. If you think that fair and proper caution was used, defendant will be entitled to a verdict."

Littledale, J., in *Dodd v Holme*, 1 A. & E, 493, says, "In enquiring whether the injury was owing to the neglect of the defendant, the state of the premises must have been a part of the consideration."

Parke, B., in *Trower v. Chadwick*, 6 Bing. N. C. 1. in Error, *Gale* 396, states the law as to the care required depending much on defendants' knowledge of the state of plaintiff's premises. In that case there was a vault on the premises. He says: "One degree of care would be required where no fault in plaintiff exists, but the soil is left in its natural and solid state; another where there is a vault; and another and still greater degree of care would be required where the adjoining wall is of a weak and fragile construction."

It seems settled that defendant is neither bound to shore up plaintiff's building, nor to give notice where no easement exists. See also *Goddard* 43; *Wood* on Nuisance, 182-3; *Broom's Legal Maxims*, 369; *Saunders* on Negligence, 75.

The defendants here were aware of the peculiar state of plaintiff's wall, as to its foundation, and as to the "made land," in ample time to have taken proper precaution against accident.

I think the verdict for plaintiff may be supported on this ground.

ARMOUR, J.—I formed the opinion at the trial, from what was proved and appeared before me, that the defendant Houston, in performing his contemplated work, had not used that ordinary care and skill which he was bound to exercise in order to avoid the injury which was occasioned to the plaintiff, and I found as a fact that the injury was caused to the plaintiff by his neglect to do so.

Having given the matter every consideration, I am unable now to come to any different conclusion, and I think, therefore, the rule should be discharged.

I have another ground upon which, in my opinion, the verdict can be sustained, but as I founded my verdict upon this ground, I see no reason for adverting further to them.

I may add that it was understood at the trial, that any amendments of the pleading might be made which the facts proved warranted.

CAMERON, J.—To support the plaintiff's claim under the above counts and pleas, it would be necessary for him to shew at least a twenty years user by himself, or those under whom he claimed, of the shop held by him, or that the excavation made by the defendant Houston on his own land was so negligently done that it would have caused the subsidence of the earth under the house if it had not been encumbered. The case of *Angus v. Dalton*, L. R. 4 Q. B. Div. 162, establishes, or rather approves, the doctrine previously established, that the owner of land built on is not entitled to support for the buildings from adjacent land unless the buildings have been so supported for twenty years at least: that the support of soil in a state of nature is a right of property, while the support of buildings is only an easement.

The evidence established that the land of the defendant Houston and that occupied by the plaintiff had

been owned by one person till within ten or eleven years, and there was nothing to shew, when he conveyed the land owned by the defendant Houston, that there was any reservation of an easement to support for the building occupied by plaintiff from the adjoining soil in fact, or from which such reservation in law must be inferred. Where a right is claimed by reason of the possession of a house or mill, and not by reason of the ownership or possession of land, it must appear that the right so claimed has been used for at least twenty years: *Frankum v. The Earl of Falmouth*, 2 A. & E. 452. The plaintiff in this case then must fail, unless the declaration can be treated as setting up a claim simply in respect of the negligence of the defendant Houston, against whom alone the verdict has been entered, and the evidence establishes the existence of such negligence.

The learned Judge found negligence at the trial, but what would be negligence with respect to excavation on land adjacent to a building entitled to the lateral support of that land, might not be negligence with reference to the land unburthened by the building; and I do not see any evidence which establishes that what was done by the defendant's authority would have caused injury to the land on which plaintiff's shop stood if the building had not been upon it. The case was not considered in that respect, nor the evidence directed to it at the trial. The defendant was not bound to shore up or otherwise protect the building containing plaintiff's shop, or to give plaintiff notice: *Chadwick v. Trower*, 6 Bing N. C. 1. The shop did not fall while defendant was excavating by reason of any unnecessary violence used in the removal of the adjacent earth, but after the excavation had been made, by reason simply of the removal of the lateral support, to which the authorities shew, on the facts presented, the plaintiff was not entitled. If defendant had dug his cellar to the line of the land occupied by plaintiff's building, and left it unwallled up for three months, the plaintiff would have no cause of action against him, because

he had no right to the support provided by the removed earth. Then, had the defendant a right to leave his cellar unwallled as long as he liked? The maxim is that a man may do what he likes with his own, so long as he does not injure his neighbour. He had the right, it appears to me, as against all not having the right to the support of his land, and it would not be negligence in him, as against this plaintiff, to leave his cellar unwallled. It appears to me inconsistent to say that the plaintiff is not entitled to lateral support of adjacent land, and yet to hold the defendant liable to the plaintiff for the removal of that to which the plaintiff is not entitled. I think the defendant cannot be held liable on the facts presented by the evidence, without imposing on the owner of land the burden, under all circumstances, of supporting or upholding the buildings, ancient or modern, on the adjoining land, when he wishes so to use his own land as to imperil their safety, or in other words, burdening his land with that obligation, and in effect overruling the current of authority which determined otherwise.

In *Smith v. Thackerah*, L. R. C. P. 564, it was held that the plaintiff, though entitled to lateral support from the defendant's land, was not entitled to maintain an action against the defendant for an invasion of that right by digging a well on his own land and carelessly filling it in with loose earth, and thereby causing a subsidence of the plaintiff's land, which would have caused an inappreciable injury were it not for certain newly erected buildings on the plaintiff's land, which were injured to the extent of fifteen pounds.

This case would seem to be opposed to that of *Brown v. Robins*, 4 H. & N. 186; but if it was well decided, it is against the plaintiff's right to recover here. I dissent, I need hardly say, from the view of my learned brothers with much diffidence.

Rule discharged.

CAMPBELL v. SHIELDS.

Tapping trees—Covenant not to cut down timber—Waste.

It is a question for the jury whether the tapping of trees for sugar making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes ; and if so found, a covenant not to cut down timber except for the lessee's use, or for purposes of improvement on the premises, will be broken by such tapping.

The general question of waste discussed.

THIS was an action for injury to the reversion of the east half of lot No. 18, in the 15th concession of the township of Grey, in the county of Huron, the declaration charging that the premises in question being in the possession of Ann Campbell, as tenant thereof to the plaintiff, the reversion then belonging to the plaintiff, the defendant injured said reversion by wrongfully cutting down, tapping, and injuring the maple trees, and other timber trees then growing and being upon said land.

The pleas were, not guilty, and a denial that the reversion was the plaintiff's.

Issue.

The case was tried at the last Spring Assizes at Goderich, before Wilson, C.J.C.P., and a jury, when it appeared that the land in question had belonged to William and Anne Campbell, who, on 10th December, 1874, conveyed it to the plaintiff, a nephew of theirs, and that he, on the same day, executed back a lease of it to them for life.

In the lease was this covenant, "The said lessees are to cut no timber on the premises hereby demised, other than for their own use or purposes of improvement on the said premises"; and there was this further provision, "The said lessor is hereby allowed to enter upon said demised premises at any time, and to cut and remove any or all timber he may wish."

It further appeared that Ann Campbell, who was then in possession, gave the defendant permission to go upon the premises and tap the maple trees thereon for the pur-

pose of making sugar, that the defendant did so, and that he cut down, besides, several dead trees for fire, with which to make the sugar on the premises, and for poles to be used in the making.

There was also evidence going to shew that the tapping was injurious to the trees.

The following written questions were put to and answered by the jury :—

1. Did Ann Campbell, the tenant for life, give verbal leave to the defendant to cut down the trees he did cut down, and to tap the maple trees ? Yes.

2. Did the defendant cut down and tap the trees as the servant and agent of Ann Campbell, that is, for her use, or for the defendant's own use ? Not as servant or agent.

If plaintiff entitled to recover a verdict, what damages do you give ? \$1.00.

3. Was the reversion, or the plaintiff's interest in the land, injured by what was done ? Yes.

Besides these written questions, the learned Chief Justice asked the jury if saplings were timber, and they answered "No."

The learned Judge seemed inclined to hold that the tenant for life might tap the trees for her own use, reporting that he also asked them to say if the reversion, or plaintiff's interest, was injured by what was done, as, in his opinion, it was in point of law.

It was objected, for defendants, that the jury were told that cutting down the trees and tapping the maple trees was an injury in law to the reversion; and, for the plaintiff, that they were told the tenant for life had the right to tap the trees.

The jury found that two of the trees cut down were timber trees, and that the reversion was injured; but a general verdict was entered for the defendant, with leave to the plaintiff to move to enter it for the plaintiff for \$1, as assessed by the jury, in case he should be held entitled to recover.

23rd May, 1879. *Bethune*, Q.C., obtained a rule *nisi* accordingly, to which, on the 6th June following, *Ferguson*, Q. C., shewed cause, citing *Kidgill v. More*. 9 C. B. 368; *Tucker v. Newman*, 11 A. & E. 40, 43; *Drake v. Wigle*, 24 C. P. 405.

Bethune, Q.C., contra.

August 30th, 1879. HAGARTY, C. J.—The words of the covenant are: “The said lessees are to cut no timber on the said premises, hereby demised, other than for their own use or purposes of improvement on the said premises.” * * “The said lessor is hereby allowed to enter upon said demised premises at any time, and to cut and remove any or all timber he may wish.”

The statutable form, under which the lease professes to be made, of covenant No. 5 is: “And not to cut down timber,” which is expanded into a covenant not to hew, fell, cut down, or destroy, or cause, or knowingly permit, &c., without consent in writing, any timber, or timber trees, except for necessary repairs or firewood, or for the purpose of clearance, as herein set forth.”

I do not see much practical difference between the words actually used in this lease and the expanded covenant in the statutable form. I should think that under the words, “shall cut no timber,” would be included any act of cutting done to a tree, involving its destruction or shortening its life.

We do not find that the learned Judge did tell the jury as to the tapping, as Mr. Ferguson complained.

1 Inst. 53 (a). “Waste properly is in houses, gardens, in timber trees, viz.: oak, ash, and elm, and these be timber trees in all places, either by cutting of them down or topping of them, or doing any act whereby the timber may decay.”

To same effect Bac. Ab. Waste C., 384, “If the lessee or his servants suffer a wood to be open, by which beasts enter and eat the germins, though they grow again, yet it is waste, for after such cutting they never will be great trees, but shrubs.”

"If a termor cut down underwood of hazel, willows, maple, or oak, which is seasonable, it is not waste."

"If usually cut and sold every ten years it is no waste; but if he dig them up by the roots, or suffer the germins to be bitten with cattle after they are felled, so as they will not grow again, the same is a destruction of the inheritance and waste lies for it." "And mowing the stacks with a wood scythe is a malicious waste; and continual mowing and biting is destruction."

Com. Dig. Waste, D. 5, p. 655. "So if a lessee does an act by which the timber decays, as if he lops and tops them.—*Dyer 65 a.*" *Yool on Waste, 24.*

The general question is discussed in *Philips v. Smith*, 14 M. & W. 589, and the notes thereto in American editions. The principles governing the American Courts in their application of the English Law of Waste to the circumstances of a new country are there noticed.

There is a case of *Carr v. Carr*, 4 Dev. & Bat. N. C. Rep. 179: Waste against a dowress in boxing and tending turpentine trees growing in the woodland portion of the dower assigned. The Court said that in parts of the State "turpentine trees are there tended as a regular crop, yielding an annual profit, but ultimately destructive of the trees themselves. * * We are of opinion, 1st, That the widow has not the right to make turpentine upon land which in the lifetime of her husband had not been used for that purpose. 2nd. That she may rightfully use in the ordinary mode of making turpentine trees that have been boxed or tended for turpentine in his lifetime. 3rd. That she may box new trees as those already boxed become unfit for use, so as not to enlarge the crop beyond the extent which it had when the dower was assigned."

In connexion with this case may be read a judgment of Sir Geo. Jessel, M. R., in *Honywood v. Honnywood*, L. R. 18 Eq. 306, as to the exceptional dealing with "estates that are cultivated merely for the produce of saleable timber, and where the timber is cut periodically."

This case and, I think I may say, most of the authorities

bearing upon the general question, are referred to in the judgment of our C. P. in *Drake v. Wigle*, 24 C. P. 405, as to the right of a dowress to clear wood for cultivation.

I have referred to these authorities as bearing on the general question, but I think that this case is governed by the covenant in the lease. I do not see how we can hold the tapping of maple trees for sugar making to be, or not to be, a breach of this covenant, or to be waste as against tenant for life, as a question of law.

I think it must be found as a question of fact by the jury whether such tapping has the effect of causing the trees to decay or tends to their destruction.

The lessee could only cut the trees for her own use or for the purpose of improvement on the premises, which would be understood as for purposes of cultivation.

If the tapping be found to cause the decay of the tree, shortening its life, or leading to its ultimate death or destruction, I think the covenant would be broken. It would be literally within the covenant as an act of cutting, and clearly within its spirit.

I do not think it necessary to discuss the larger question as to the general right of a tenant for life or years—unrestrained by express covenant—to make sugar from the maple sap, if such were proved to be the ordinary course of husbandry and management of a farm, in all or in part, covered with forest.

The remarks of the Court, in *Drake v. Wigle*, may be referred to on this head.

The jury here have found that the plaintiff's reversion was injured by what was done. If we can consider this finding as involving the decision, that the cutting or tapping was injurious to the vitality of the tree and leading to its decay, I think such a finding would be clearly right; but I cannot find that such a point was left to them; on the contrary, the learned Chief Justice seems to have inclined to hold that tenant for life had the right to tap the trees.

There was evidence from which the jury would have

been fully justified in holding that tapping was injurious to the life of the tree.

The jury also found that the two trees cut were timber trees.

They were cut, it appears, for firewood, and for poles for use in the process of sugar making. But the general verdict here is entered for the defendant, and we are now asked to enter it for plaintiff for one dollar, on the leave reserved, being the amount assessed by the jury if plaintiff be entitled to recover.

The simplest way to view the case is as between lessor and lessee, and on amended pleadings.

On the questions and answers as they stand, we think the plaintiff is entitled to have the verdict entered for him. It is found that the trees cut were timber trees, and also that plaintiff's reversion was injured. The damages are only nominal, and there is evidence to support the finding. If the case wholly turned on the right of the tenant for life to tap the trees for sugar, we should have to send the case to a new trial to have the facts expressly found; but on the leave reserved we cannot refuse to enter the verdict for the plaintiff.

We may fairly assume that the reversion was found to be injured, and the nominal damages awarded for the two timber trees cut, and not for the tapping; and that even if the making of sugar was allowable, there was no necessity whatever for cutting down these trees for any purpose connected therewith.

ARMOUR and CAMERON, J.J., concurred.

Rule absolute.

MEMORANDA.

During this term the following gentlemen were called to the Bar :—

THOMAS STINSON JARVIS, THOMAS TAYLOR ROLPH, LOUIS ADOLPHE OLIVIER, MALCOLM GRÆME CAMERON, GEORGE EDGAR MILLAR, NICHOLAS DUBOIS BECK, WALTER J. BREAKENRIDGE READ, EMERSON COATSWORTH, JR., JOHN MORROW, JAMES CARMAN ROSS, ALPHONSE BASIL KLEIN, EDWARD GEORGE PONTON.

SITTINGS IN VACATION

AFTER TRINITY TERM.

REGINA V. LENNON.

*Attempt to obtain information as to voting—R. S. O. ch. 174, sec. 162—
Conviction—Costs—Amendment.*

There is no general power to award costs upon a conviction under an Ontario Statute, where such power is not given by the Statute itself; and therefore where, on a conviction under section 162, ch. 174, R. S. O., for attempting to obtain information at the polling place as to the candidate for whom a voter was about to vote, costs were awarded against the defendant, the conviction was ordered to be quashed.

Held, also, that there was no power to amend the conviction in this respect.

Robert M. Fleming obtained a rule *nisi*, upon reading the writ of *certiorari* and the return thereto, and the deposition and other papers filed, to quash the conviction in this case, on the grounds:—1. That it awarded costs to the informant. 2. That there was no evidence of the offence for which the defendant was convicted, viz., that he had attempted to obtain information as to how the voter was *about to vote*, the only offence, if any, proved being that he had attempted to obtain information as to how the voter *had* voted.

The defendant had been convicted, under the 162nd section of the Municipal Act, R. S. O. ch. 174, for the offence of having attempted to obtain information at the polling place for the candidate for whom a certain voter at such polling place was about to vote. He was adjudged to be imprisoned for two days, and to pay the costs of the prosecution. He then appealed to the General Sessions, and his appeal was dismissed, with costs.

On September 2nd, 1879, *Milligan* shewed cause. As to the first objection. The power to impose costs is given by Consol. Stat. Canada, ch. 103, sec. 53. This was repealed by 32-33 Vic. ch. 36, C., which provides that such repeal shall not affect cases under Provincial statutes. The section is repeated in 32-33 Vic. ch. 31, sec. 53, C., which regulates the practice and procedure in all cases of summary jurisdiction, and under which the justices rightly imposed costs: R. S. O. ch. 74, sec. 1. If the conviction be bad in part only, and the parts be sufficiently divisible, the conviction should be quashed as to that part only: *Regina v. Simpson*, 1 Hannay 32; *Paley on Convictions* 476. If the General Sessions had held the objection good, they would, under sec. 68 of ch. 31, 32-33 Vic. C., have been bound to amend, as that statute regulates the practice and procedure on such an appeal by virtue of ch. 74, R. S. O. sec. 4, and the writ of *certiorari* merely substitutes the Court above for the Court below, and whatever should have been done there must be done here: *Regina v. Wightman*, 29 U. C. R. 214; *Rex v. Williams*, 9 B. & C. 556. The offence is rightly described. If the prosecutor had at once detected the imposition and had not acted at all, the offence would nevertheless be complete, and could not be otherwise described.

Fleming, contra. By R. S. O., ch. 74, sec. 1, procedure before Justices for any contravention of any Ontario statute is to be the same as under Dominion Acts respecting procedure on summary convictions. By sec. 4, practice and proceedings on appeal to General Sessions are to be the same as under Dominion statutes. By sec. 53 of 32-33 Vic. ch. 30, D., justices may award costs in all cases of summary convictions. This is the whole argument of the prosecution; but practice and procedure do not make the consequences of procedure. The distinction between practice and costs is pointed out in *Re Osler*, 7 P. R. 80. By the B. N. A. Act, sec. 92, sub-sec. 15, Local Legislatures have power by the imposition of "fine, penalty, or imprisonment," for enforcing any law of the Province.

In *Reg. v. Black*, 43 Q. B. 180, Harrison, C. J., doubts the power of the Ontario Legislature to impose imprisonment with hard labour. The punishment must be the exact punishment imposed by the statute. See *Whitehead v. The Queen*, 7 Q. B. 582; *Rex v. Hoseason*, 14 East. 605. Then, upon the very ground that the *certiorari* was granted in this case, and upon the analogy of the case of *Re Philo D. Bates*, 40 Q. B. 284, the Justices have no power to award costs. The statute cited by Mr. Milligan, Con Stats. Can. ch. 101, sec. 53, cannot now be in force. On the other ground taken in the rule the conviction is also bad. The offence, if any was proved, should have been for attempting to ascertain how Cummings *had* voted.

September 9th, 1879, OSLER, J.—The substantial question is, whether the justices had power, in addition to the punishment of imprisonment, to impose payment of the costs of the prosecution upon the defendant.

The penal clause is sub-sec. 6 of sec. 162: "Every person who acts in contravention of this section shall be liable, on summary conviction before two justices of the peace, to imprisonment for any term not exceeding six months, with or without hard labour."

It was contended that cap. 103 Consol. Stat. Can. (the Act relating to summary convictions) was still in force as regarded convictions for offences under any statute of the Province of Ontario, and that the justices therefore had power, under sections 53 and 56 of that Act, to award costs, though not authorized to do so by the penal clause above quoted. This Act was repealed by 32-33 Vict. C., cap. 36, except as to subjects under the control of the Local Legislatures, and cap. 31 of the same Session was passed to amend and consolidate the statute law of the several Provinces relating to summary convictions for any offence or act over which the Parliament of Canada had jurisdiction.

Sections 53 and 56 of this Act correspond with the same sections of ch. 103, above referred to. They pro-

vide that in all cases of summary conviction Justices may in their discretion award costs to the prosecutor, which may be recovered by distress, and in default by imprisonment, with or without hard labour.

The result of this legislation was, that ch. 103 Consol. Stat. Can. remained in force as regarded matters within the control of the Provincial Legislature. But by 38 Vict. Ont., ch. 4, now, as amended and consolidated, R. S. O. c. 74, ch. 103, C. S. C. was also repealed, so far as it related to Ontario, and the 1st section of the Revised Statute enacts that where a penalty or punishment is imposed under the authority of any statute of Ontario, and is recoverable before or may be inflicted by a justice or justices of the peace, the like *proceedings*, and no other, shall and may be had for (a) *recovering* the penalty, (b) compelling the attendance of the parties or witnesses, (c) hearing the complaint, and (d) for the conduct of the Court, (e) the taking and estreating of recognizances, and (f) the *infliction* of the punishment, and (g) otherwise in respect thereof; and the justices shall perform the like duties with respect thereto, and in respect of any order made by them by virtue of such statute as, under the statutes of the Dominion then in force, might be had and should be performed if such penalty or punishment had been imposed by a Statute of Canada, unless in any Act thereafter passed imposing the same it is otherwise declared.

The clauses (b), (c), (d), and (e), were inserted in the section as it now appears in the Rev. Stats. O., by authority of 40 Vic. ch. 7, Schd. A (109), from which it may be inferred that the Legislature thought that the section, as originally framed, was not wide enough to embrace the whole of the provisions of the Summary Convictions Act of Canada.

The 4th section of the Act (R. S. O. ch. 74,) enacts that where an appeal lies from a conviction made under the authority of a statute of Ontario, the practice and proceedings on the appeal and preliminary thereto, and otherwise in respect thereof, shall be the same as the practice

and proceedings under the statute of the Dominion of Canada on an appeal to the General Sessions of the Peace from a conviction made under the authority of a Statute of Canada.

In *Re Bates*, 40 U. C. R. 284, it was held that the provision in the Summary Convictions Act of Canada, taking away the writ of *certiorari* when the conviction had been affirmed on appeal, had not been made applicable, by the section just quoted, to the case of a conviction made under the authority of a Statute of Ontario; and therefore that such a conviction might be removed by *certiorari* and quashed, notwithstanding its affirmance by the Sessions on appeal.

Upon the best consideration which I have been able to give to the subject, I am of opinion that the imposition of the costs of the prosecution is not, under the Dominion Statute, "a proceeding for the recovery of the penalty, or the infliction of the punishment, or otherwise in respect thereof," or "a duty to be performed by the justice in respect thereto or in respect of the conviction," but is a distinct discretionary power vested in him, wholly apart from such proceedings and duties. If this construction be correct, it follows that there is no general power to award costs upon a conviction made under the authority of a Statute of Ontario, where, as in the present case, such power is not given by the Statute itself.

It may be observed, in support of the view which I have taken of this section, (R. S. O. ch. 74, sec. 1) that although it is headed "procedure before justices," and the marginal note is, "procedure before justices to be the same as under Dominion Acts," it makes no provision for the case of the dismissal of a prosecution: it clearly deals with cases of conviction only, and if it be held that by force of it costs may be awarded in those cases, it is equally clear that it has not adopted the 54th section of the Dominion Act, which gives the justices discretion to award costs to the defendant against the prosecutor when the case is dismissed.

Mr. Milligan asked that I should amend the conviction by striking out that part of it which awards costs. I am not aware of any case in which that has been done when the conviction has been brought up on *certiorari*. The English Acts, referred to in *Paley on Convictions*, authorizing an amendment in such cases, have not been enacted in this country, except in certain cases of convictions under the Liquor License Act.

In my opinion the rule must be absolute to quash the conviction, without costs.

Rule absolute, without costs.

In re THE ARBITRATION BETWEEN THE CORPORATION OF
THE VILLAGE OF POINT EDWARD AND THE CORPORATION
OF THE TOWNSHIP OF SARNIA.

Separation of municipality—Arbitration as to debts—Liability for Government drainage—Application to refer back award—Defective materials—Practice.

Held, that in the case of the separation of part of a township and its erection into an incorporated village, the liability to assessment in respect of Government drainage, which had been done under the Ontario Drainage Act on the application of the township, but for which the assessment had not been completed, was not a matter to be arbitrated upon between the two corporations under the Municipal Act, as being a debt of the township to which the village ought to contribute, each corporation being bound by the Ontario Drainage Act to raise the amount assessed in respect of such drainage upon the land locally situated within it.

Held, also, that on an application to set aside an award made under the Municipal Act, the by-laws of the municipalities appointing the arbitrators, or copies thereof, and the appointment of the third arbitrator, should also have been filed.

On the 29th of August, 1879, *Bethune, Q. C.*, obtained a rule *nisi* on behalf of the corporation of the township of Sarnia, calling upon the corporation of the village of

Point Edward to shew cause why the award and matters in difference between the two corporations should not be referred back to the arbitrators, with instructions to reconsider and determine what proportion of the liability of the township of Sarnia, on account of the expenditure, within the limits of that township, of public money for drainage works, should be assessed upon and borne by the village of Point Edward; on the ground that the arbitrators had not determined the question of such liability.

On the 30th of September, 1879, *J. K. Kerr*, Q. C., shewed cause, taking the preliminary objection that there were no materials properly before the Court upon which the rule *nisi* could have been granted, it appearing that the only papers filed consisted of a document purporting to be an award made by Robert Fleck, Ebenezer Watson, and David Harlie, a copy of the evidence taken in the matter of the arbitration, purporting to be certified by one of the arbitrators, and a printed copy of the Auditors' Report, for 1878, of the township of Sarnia; and there was no affidavit verifying any of these papers, nor any copies of the by-law appointing the arbitrators. Subject to this objection the case was argued on the merits.

Bethune, Q. C., supported the rule.

The Municipal Act, R. S. O., ch. 174, secs. 11, 12, 13, 27, 367, 379, 383, 385, and the Ontario Drainage Act, R. S. O., ch. 33, were referred to.

The facts are stated in the judgment.

October 3rd, 1879. OSLER, J.—So far as I can ascertain the facts from the papers before me, it appears that the corporation of the township of Sarnia had applied for the construction of drainage works under The Ontario Drainage Act, R. S. O., ch. 33, and that drains had been constructed at a cost of \$43,470.

Before the assessment provided for by the Act had been made, the village of Point Edward was separated from the township and erected into a separate municipality, and at

the time the arbitration was held the assessors had not completed their work. The clerk of the township in his evidence says: "I cannot tell what sum the township will be liable to pay for this (the Government drainage). I think it will be a large amount; the assessors employed by the township have not yet completed their work; they commenced work about three weeks ago. I think they will complete their roll in a week or ten days' time. The Government drainage was undertaken in 1874 and completed in 1877. During this time Point Edward formed part of the township of Sarnia. I do not think the Government drains will benefit any of the lands or streets of Point Edward. The reason we did not settle with Point Edward was, that we could not settle as to the Government drainage."

The 4th clause of the award is as follows: "In regard to the Government drainage of parts of the township of Sarnia, entered into and completed while the township of Sarnia and the village of Point Edward were one municipality, the arbitrators feel that there is nothing before them to shew the extent of the liability of either the corporation of Sarnia or the corporation of Point Edward, and therefore determine nothing in regard to this matter."

It is not clear whether the drainage was continued into the municipality of Point Edward, or rather into the area now included within that municipality, or whether it is contended only that there are lands and roads there which are benefited without the drainage being continued. I should infer that the latter is the case.

If the Government drainage assessment is not a claim which is properly the subject of arbitration between the two municipalities under the 11th and 27th sections of the Municipal Act, the award should be upheld, as the fourth clause above referred to would, in that case, be merely surplusage, and may be rejected, and the residue of the award would be good.

It is necessary to examine several of the clauses of the Ontario Drainage Act.

Sections 4 and 5 provide that the Commissioner of Public Works may undertake the drainage on request of the municipality, or on petition of resident freeholders.

Section 6.—The work may, if necessary, be continued beyond the limits of the municipality, &c., and the adjoining municipality will then be in the same position as if they had petitioned for the work.

Sections 7, 8, 9, 10, provide for the appointment of assessors who shall assess all lands and roads benefited by such drainage.

Section 11.—The assessors shall visit and inspect the lands and assess them, setting opposite each parcel the proportion of the total amount expended which ought to be payable in respect of the parcel of land so drained.

Sections 14 and 19 give an appeal by the land owners from the assessment to the Court of Revision of the municipality *in which the lands or roads benefited by the drainage lie*, and provide for the publication of the assessment roll, notice of holding the Court of Revision, and proceedings thereat, &c.

Section 20.—Where lands in an adjoining municipality are assessed, the assessment roll not to be published until the amount to be paid by such adjoining municipality is determined by arbitration or otherwise.

Section 21.—When drainage works do not extend beyond the limits of the municipality in which they were commenced, but, in the opinion of the assessors, benefit lands in an adjoining municipality, then they shall charge the lands so benefited with such proportion of the costs of the work as they may deem just.

Section 23.—The council of the municipality which applied for the drainage shall serve the head of the council of the municipality into which the work was continued, or whose lands or roads were benefited without the drainage being continued, with a copy of the assessment roll mentioned in section 13, so far as it affects such last mentioned municipality, the same to be binding on them unless appealed from.

Section 24.—The last mentioned council shall be bound, as if they had petitioned for the drainage under the fourth section, *to raise the sum named in the assessment roll*, or in case of appeal, for such sum as may be determined by the arbitrators.

Sections 25 and '29, provide for an appeal by the last mentioned council, and arbitration thereon between the two municipalities, one copy of the award to be filed with the clerk of each of the municipalities interested.

Section 35.—The council of every municipality within which drainage works have been completed, shall within three months after the assessment roll has been finally passed, pass a by-law requiring that the amount to be collected and charged on the several parcels of land by such municipality shall be placed on the collector's roll from year to year, to be collected and paid over.

Section 36.—The respective sums of money which by the said assessment roll are specified as the proportions payable in respect of the lands * * *so drained or improved by drainage* * * * shall be a first charge on such several parcels of land, payable by way of rent charge in the proportions and for the time specified in the section.

Section 37.—Every such rent charge shall be entered by the clerk of the municipality, *i. e.*, the municipality in which the said land is locally situate, in the collector's roll, and collected like other taxes, and be remitted by the local treasurer to the Provincial Treasurer within one month after the taxes are exigible.

Section 38, provides that the council of every such municipality, *i. e.*, the municipality in which the lands are locally situate, shall remit the annual rent charge, even though not collected; and to enable the local treasurer to do so, compels them to levy on the *whole ratable property within their jurisdiction* a sufficient sum to cover the amount of the rent charge.

Section 39 imposes stringent penalties upon the local treasurers and other municipal officers who omit to carry into effect the foregoing provisions.

Two sections of the Municipal Act, R. S. O., ch. 174, may also be referred to.

Section 50 provides that by-laws in force prior to formation of a new corporation are to continue in force until altered by the council of such corporation ; and Section 52 provides that in case of the erection of any *locality* into an incorporated village, &c., the village, &c., shall remain subject to the debts to which such *locality* was previously liable as if the same had been contracted or incurred by the new municipality.

In the case before me the village of Point Edward had been erected into a separate independent municipality long before the time when the assessment in respect of the drainage works in question was to be made, although after the works themselves had been completed.

It appears to me that the rights and liabilities of the two municipalities are to be worked out under the Ontario Drainage Act, and that the assessors and the municipality of Sarnia should have adopted the proceedings pointed out in that Act, for charging upon the lots or parcels of lands within the limits of Point Edward the proportion they should bear of the costs of the works. The manifest intention of the Act is, that each municipality shall collect and be responsible to the Provincial Treasurer for the amounts charged upon the lands benefited within its own jurisdiction ; and there does not appear to be cast upon the township of Sarnia any liability whatever to account to that officer for any moneys appearing by the assessment roll to be charged on lands or roads within the limits of Point Edward. The roll, unless appealed from, binds that municipality (sec. 23), and they are bound to raise the amount mentioned in it, as they had petitioned for the drainage (sec. 24). All that each municipality is bound to do under sections 37, 38, 39, is to collect, and in any case to pay over to the Provincial Treasurer the amount of the rent charge on the lands locally situate within such municipality ; and when the township of Sarnia have appointed assessors, and served the village of Point Edward with a copy of the assessment

roll, they will, in the absence of an appeal by the latter, have discharged themselves, as it seems to me, of all further responsibility in respect of lands situate within the jurisdiction of the village. Reading sections 4, 24, and 35 together, it will then, in my opinion, become the duty of the village municipality to pass the by-law mentioned in section 35, to provide for raising the sum named in the assessment roll as charged against lands within the village, and the municipality of Sarnia will have no further concern with it.

Nor do I see why the result should be different, if the village had not been incorporated until after the assessment had been completed; the by-law of the township would, as regards the lands within it, have been also the by-law of the village, and the lands in the village locally liable before, would have remained so after its incorporation.

Upon the whole, then, I arrive at the conclusion, clear to my own mind, at least, that the assessment in respect of Government drainage was not a matter to be arbitrated upon between these two corporations under the Municipal Act, as being a debt of the township to which the village ought to contribute, for each corporation, as I have endeavoured to point out, bears its own proportion under the Ontario Drainage Act alone.

I ought, perhaps, to say a word as to the formal objection. The case having been argued upon the merits, and my decision being adverse to the applicants, I do not dispose of the rule on that objection. It would, however, probably have proved a fatal one. None of the papers being verified, and there being no affidavit as to the facts, there was really nothing before the Court. The by-laws of the municipalities appointing the arbitrators, or copies thereof, and the appointment of the third arbitrator should also have been filed, so that it might have appeared that the award was one subject to the jurisdiction of the Court under the Municipal Act.

The rule is therefore discharged, with costs.

Rule discharged, with costs.

THE MERCHANTS BANK V. THE UNITED EMPIRE CLUB
COMPANY ET AL..

Promissory note—Corporation—Liability of endorser—Pleading.

Held, that the endorser of a promissory note, purporting to be made by a corporation, is estopped from alleging that the note was *ultra vires* the makers.

Held, also, that the instrument in question in this case having been declared on as a promissory note, and not stated to have been under seal, it could not be assumed, in favour of the endorser, that it had been so executed as to deprive it of its negotiable character, but that if under seal the point should have been raised by plea.

DECLARATION on a promissory note for \$500, made by the defendants, The United Empire Club, payable to the order of the defendants, Close, Shields, and Forlong, and by the defendants endorsed to the plaintiffs.

Demurrer by the defendant Shields: 1. That the defendants, the United Empire Club, being a body corporate, incorporated by chapter 102 of 39 Vic. O., for the purposes only, and with the powers only in said Act named, and not for trading or other purposes, cannot make a promissory note, and the declaration therefore shews no liability on the part of the other defendants. 2. That said Club can only contract by its corporate seal, and the promise sued upon, if binding, must be assumed to be under such seal, and is a specialty and not a note; and by the endorsement of such a promise under seal the other defendants do not incur any liability to the plaintiffs, such endorsement amounting to no more than an assignment of the debt to the plaintiffs. 3. That the said defendant Shields, if liable at all, is only liable to be sued jointly with the defendants Close and Forlong, and not jointly with them and the said Club.

September 30, 1879. *Appelle*, for the demurrer, cited *Topping v. Buffalo, Brantford and Goderich R. W. Co.*, 6 C. P. 141; *Gilbert v. McAnnany*, 28 U. C. R. 384; *Snarr v. Toronto Permanent Building and Savings Society*, 29 U. C. R. 317; *Stoessiger v. South Eastern Railway Co.*, 3 E.

& B. 553; *McCall v. Taylor*, 34 L. J. C. P. 365; *Grant on Corporations*, p. 276; *Byles on Bills*, last ed. p. 71.

H. J. Scott, contra, cited *Chalmers on Bills of Exchange*, p. 170, art. 219; *Phillips v. im Thurm*, L. R. 1 C. P. 463; *Erwin v. Downs*, 15 N. Y. Rs. 575.

October 3, 1879. OSLER, J.—The instrument declared upon is in form a negotiable promissory note, payable to the order of and endorsed by the defendants, Close, Shields, and Forlong. It is not stated to be under the seal of the defendants, the United Empire Club Company. Several cases were cited to shew that the company having no express power by their charter, nor any implied power from the nature of their business, to make notes, the note sued upon was void as against them. Probably it is. But the endorsers contend, at least one of them does, that inasmuch as the note is *ultra vires* of the makers, they have incurred no liability by their endorsement. In my opinion that does not necessarily follow. They have, in effect, agreed with the plaintiffs, who upon this record must be taken to be holders for value and in good faith, to assume that the company *had* power to make the note in question, and they are estopped from asserting that the fact is otherwise. To this effect are all the authorities.

In *Byles on Bills*, 11th ed., p. 153, it is laid down that an endorsement admits the signature and capacity of every prior party.

The case of *Hallifax v. Lyle*, 3 Ex. 446, is very much in point. There the acceptor of a bill of exchange, drawn by a corporation, was held estopped from denying the authority or power of the drawers, as being a corporation, to draw or endorse the bill. And in our own Courts there is the case of the *Bank of Montreal v. DeLatre*, 5 U. C. R. 363, which was an action upon a bill drawn by "The Coalbrook Dale Company, *per* Philip Holland." The defendant, the acceptor, pleaded that the company did not draw the bill *modo et formâ*. Robinson, C. J., in giving judgment, said: "The acceptance * * * precludes the setting

up of any legal technical objection in regard to the composition or description of the company or their ability to draw a bill; * * * and as the defendant has accepted a bill drawn upon him by them, and has thus affirmed their right to draw and thereby given credit to the bill, he cannot be allowed in an action by the payee or endorsee, to question their right, nor even to question the fact that they did draw the bill."

The principle is well stated in *Ashpitel v. Bryan*, 3 B. & S. 474, 5 B. & S. 723, Ex. Ch. The bill there was drawn and endorsed in the name of a deceased person. The defendant accepted it, knowing that to be the case. Wightman, J., says: "There are cases which shew that after a person has by his own act warranted that what appears on the face of a bill is perfectly regular, and has received value for it, after he has agreed with the person from whom he received value, and who is the holder of the bill, that the bill should be drawn and endorsed in the names which appear on it, he is not permitted to shew that those names are false or fictitious, and to set up what would be a fraud upon the party who has given value for the acceptance." And Crompton, J., says: "When two parties agree that a commercial instrument shall be taken as founded upon a certain fact, and the position of one by acting on that agreement is altered, the other ought not to be admitted to deny it; and in this class of estoppels, deceit, in which is involved the question whether the party knew the real state of facts, is not necessary."

Every word of this applies to the case before me. If the acceptor or endorser of a bill drawn and endorsed in the name of a dead man, or a fictitious person, or a married woman, or an infant, is estopped from setting up the incapacity of the drawer or endorser, I think it follows that the endorser of a note, purporting to be made by a corporation, is also estopped from alleging that the note was *ultra vires* of the makers.

It is next objected that as the company can only contract under their corporate seal, the instrument declared

on is, therefore, a specialty, and not a promissory note nor capable of endorsement.

I think the answer to this objection is, that the note is not in the declaration stated to be under seal. If it is under seal and for that reason not a promissory note, the defendants should have pleaded so as to raise the point. Not having done so, I cannot assume in their favour that the note has been so executed as to deprive it of its negotiable character. In *Crouch v. The Credit Foncier of England*, L. R. 8 Q. B. 374, the question whether an instrument under the seal of a corporation can be a promissory note, is discussed but not decided; and in *Brice on Ultra Vires*, 2nd ed., p. 303, it is said that the seal of a corporation affixed to the note or bill is simply inoperative, not interfering with the negotiability of the instrument if otherwise valid, and not converting into a deed or covenant a document purporting to be negotiable, but which the corporation had no power to make.

It was not attempted to support the last objection taken by the demurrer. The plaintiffs are, in my opinion, entitled to judgment.

Judgment for plaintiffs on demurrer.

LYON V. STADACONA INSURANCE COMPANY.

Fire insurance—Interest of insured in vessel—Representation as to stove on vessel—Right to use for refitting.

One of the questions contained in an application for insurance on a steam vessel was, "State fully the applicant's interest in the property, whether owner, mortgagee, &c," to which the answer was "owner." It appeared that the assured, on the purchase of the vessel, arranged with the vendor that he should retain a sixteenth interest, in order that the assured might obtain the benefit of a contract made with the vendor by one P. not to put an opposition boat on the route, and sixty shares only were therefore transferred to the assured. It further appeared that the true state of the title was fully disclosed to the defendants' agent at the time of the insurance and discussed between him and assured: *Held*, that in the answer to the question there was involved no misrepresentation or non-communication of any material fact; and that in the absence of fraud or bad faith, neither of which was imputed, it was true in letter and in spirit; and that the plaintiff was therefore entitled to recover.

Another of the questions contained in the printed form, which was that used in insuring buildings, was whether the stoves, funnels, flues, &c., employed for heating or using fire were properly secured, to which the answer was "None." The application was filled up by the defendants' agent, and on the back was written, "No fire is used on the steamer;" while to the question specially addressed to himself, "Are there any other circumstances connected with danger of fire to the property proposed for insurance," his answer was, "No," and that he confidently recommended the risk. In his evidence at the trial he stated that the plaintiff told him there was a stove on board, but that there would be no fire lighted until he was fitting up in the spring: that he turned to his book of instructions, and when plaintiff asked him if he could light a fire then, he said certainly, and his doing so would not affect the policy. The book of instructions provided that the risk was to include ordinary refitting in spring, and that the policy was to specify the kind of fuel to be burned: *Held*, that the word "None," written after the questions must mean, in the words of the questions, that there were no stoves, funnels, flues, and other apparatus employed for heating or using fire, and not that there was no stove on the vessel used or unused.

Held, also, that defendants must be held liable on the explanation given by their agent to plaintiff as to his right to use the stove for refitting purposes, which the risk must therefore be considered to have included.

ACTION on a policy of insurance for \$4,000, effected on the 18th of December, 1876, with the defendants, by one Collier, as owner, on the steamer "Norfolk," for four months, alleging loss by fire while said Collier was owner, and assignment by him, after loss, to the plaintiff, of all claims under the policy.

Pleas: 1. *Non est factum*. 2. Denial of assignment. 3.

Action not brought within six months after loss. 4. Steamer not of value of \$7,000, as alleged in the application for insurance, but only worth \$4,000, which was a material misrepresentation. 5. Same as the 4th as to the value, basing it upon a condition in the policy. 6. That the policy issued upon representations in the application by Collier, who thereby covenanted that the same were, a just, full, and true exposition respecting said steamer, its value, &c., so far as known to him, and were material to the risk, and that they should form the basis of defendants' liability, and form part and condition of said insurance contract; and that said Collier stated in said application he was owner of said steamer, when he was at the time owner of only sixty shares, the other four being owned by one W. Owens. 7. That after the making of the policy Collier increased the risk without defendants' knowledge by use of fire in a stove in said steamer. 8. That before and at the time the policy was effected a stove was placed in said steamer to be used, which was a material fact to be made known, but which was concealed, and thereby the policy was avoided. 9. That defendants were induced to make said policy by the fraud of Collier. 10. That at the time of effecting said policy Collier represented to defendants that no fire was used in said steamer, and that there were no stoves, &c., used for heating or fire, the truth of which was material to be made known to defendants; yet there was at the time a stove in said steamer to the knowledge of Collier, which was afterwards used for heating purposes therein without defendants' knowledge, whereby said policy became void. 11. That Collier stated there were no stoves, funnels, flues, &c., for heating, whereas after effecting said policy he erected on said steamer, without defendants' knowledge, a stove and pipes, and used fire therein. 12. Same in effect as the 11th plea. 13. Setting out a condition that if after insurance effected there was any erection, &c., on the premises, increasing the risk, or any erection for producing heat, and the same was not made known to defendants, the insured should not be entitled to any

benefit under the policy, &c. *Averment*, that after the effecting of the policy Collier erected a stove and pipes, and used the same for putting fire therein, thereby increasing the risk, and did not notify defendants of said erection of said stove and pipes.

Issue.

Replication, to the 3rd, 4th, 6th, 11th, 12th, and 13th pleas, of the statute 39 Vic. ch. 24, and that the conditions mentioned in said pleas were not "statutory conditions," or in conformity therewith, and that to said policy were not added in conspicuous type, and in ink of a different colour, words to the effect mentioned in sec. 1 of said Act, required to be added when desired to vary in any such policy said conditions, or to add new ones, by reason whereof said conditions in said pleas mentioned became inoperative and of none effect.

The case was tried at the Toronto Spring Assizes for 1878, before Armour, J., and a jury.

The application for insurance contained these words: "The applicant hereby covenants and agrees, &c., that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk, and agrees and consents that the same be held to form the basis of the liability of the company, and shall form a part and be a condition of this insurance contract. It is further agreed, &c., that if the agent of the company fill up the application he will in that case be the agent of the applicant, and not the agent of the company."

The application here was filled out by defendants' agent. The cash value of the vessel was stated at \$7,000, and the amount insured was \$4,000. The form of application was that printed for use in the insurance of buildings, the forms of questions and answers in many respects being unsuitable to insurance on a steam vessel.

At the head of the application was a printed notice that two-thirds, or at the most that three-fourths only of the

cash value was to be insured, and that the estimated cash value of personal property, &c., and the sum to be insured on each must be stated separately.

It was strongly urged that there was a misrepresentation as to value, and witnesses for the defence estimated the value at one-half of the amount mentioned. Evidence was given supporting the plaintiff's view, and it appeared that the boat had cost him over the estimated value, and the value was freely discussed between him and the agent, and what the plaintiff had given for her. The agent wrote down the estimated cash value.

On his examination he said: "I spoke to Collier before he mentioned risk to me. It was my custom to solicit risks from people after I had got instructions. They would take risks on steamers in winter quarters. I went and spoke to Mr. Collier. He said he hardly thought it worth while insuring, as the vessel was hard froze in the ice. I said she might be frozen in, and yet be burned. The application is in my handwriting. I think I drew the diagram on the back of it. I went on the boat and looked over it, and took a diagram of her. I made a measurement. I put in the figures \$7,000.00. When it came to the question of valuation Collier said like this. I said, 'here is a column as to value and one as to estimated cash value.' It was the first risk I had on steamers. I had no applications except the one here, and this was for an ordinary building. I wrote to Belleville, to get them to send me applications for steamers; I supposed the secretary to whom I wrote would have sent me a marine application. He wrote me back and said, 'the one you used will do, we have no other kind.' Collier, when I said, 'now in regard to the question of valuation,' said I was to give \$7,000.00 for the boat; but when we went to draw the writings at Kingston, it was found that when Mr. Owens bought from Port, the latter agreed not to run on the route for so many years; the lawyer said if he bought the boat out and out Port might put a boat on the route any time; therefore Mr. Owens retained four shares. With the exception of these four

shares, he said the boat was worth \$7,000.00. He said there was a stove on board, of course. He said it was sometimes the case that parties stayed on board the boats during the winter; but there would be no one living on board his boat. I turned to my book of instructions. He said there should be no fire lit until he would be fitting. He asked me if he could light a fire then; and I said, 'certainly, no sane man would suppose you were not to put a fire in the stove that was necessary at such a time.' I said it would not interfere with it. I said after steam was up the policy would be no good; but for building a fire at the time of fitting it would not affect the policy—no sane man would think so. As to the valuation I put down, is it worth that? He said he had laid out \$600.00 or \$700.00, and that would make it worth more than \$7,000.00."

Cross-examined—"I asked him the valuation, and he answered in the way I have stated. He did not give any definite amount; he said he would like \$4,000.00 on her. He said nothing about the route or the good-will any more than I have stated. That was an after-consideration. Owens was willing to keep the other man off. I am no judge of the value of steamers. I am not positive if I read it over to Collier after I filled it up. I read the questions as they came in, and wrote the answers down. I presume I did ask him all the questions, but I will not swear positive. I do not think I read anything to him after I put it down. That is my handwriting, *no fire used on the steamer nor on any of the vessels near it*. I went to several of the vessels, and found there was no fire. That is my handwriting, but I do not remember writing it."

Collier proved the assignment of the policy to the plaintiff, and the burning of the vessel; that the application was not filled up in his own hand-writing, but in the agents; that he paid \$7,000 for the vessel; that he owned sixty shares, and Owens the remaining four shares; that there was a stove on her when she was insured; that the agent told him he would have

the right to use the stove when he came to fit up in the spring.

The further facts material to the case appear in the judgment.

The jury found that plaintiff had made a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as the same were known to him and material to the risk, and that he sustained loss to the full amount insured, and they rendered a verdict accordingly.

In Easter Term following, 25th of May, 1878, *C. Robinson*, Q. C., obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit or verdict for the defendants, pursuant to leave reserved at the trial, or for a new trial, on the ground that the verdict was contrary to law and evidence, in this, that it was proved that Collier, the person who effected the insurance, did not make a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same were known to him and material to the risk; and that the said Collier did make an untrue representation as to the ownership of the vessel insured, being a fact known to him and material to the risk; and that the said Collier, in the application on which the said insurance was effected and based, made untrue representations in regard to matters material to be made known to the defendants and to the risk, and known to the said Collier and warranted by him to be true; and for misdirection of the learned Judge in directing the jury that the policy sued upon was not subject to any conditions, statutory or otherwise, and that the statute prescribing conditions was applicable to and binding upon the defendants.

In Michaelmas Term following, 30th November, 1878, *Ferguson*, Q. C., shewed cause, contending that erroneous statements in the application, so long as there is a fair representation of the facts, will not avoid a policy: *Imperial Fire Ins. Co. v. Murray*, 73 Penn. Rs. 13. Then,

on the question of value, see *McCuaig v. Unity Fire Ins. Co.*, 9 C. P. 85; *Dickson v. Equitable Fire Ins. Co.*, 18 U. C. R. 246.

Robinson, Q. C., and *O'Brien*, contra. The defendants were satisfied there was an over-valuation. They offered what the vessel was worth, but this was refused. Then, as to the stove, the plaintiff stated that there was no heating apparatus on board, whereas there was, which was not only a breach of the contract, by increasing the risk, but was a material circumstance to have been disclosed to the defendants. As to the ownership, he represented himself as owner, whereas he only owned 60 shares; yet he warranted the statement.

February 8th, 1879. HAGARTY, C. J.—It is conceded that by the judgment of this Court the policy in this case is to be considered as one without conditions, and that the Ontario Act is binding.

The Court of Common Pleas in *Parsons v. Queen Ins. Co.*, appear to take a different view as to the conditions, but we think we ought to follow the law of this Court laid down in this case.

The case must rest on the objections arising on the application. There is no authority for the argument, however, that we can overlook the statements and representations contained in the application, or that we must not regard it as the basis of the contract.

On the question of value, reading the evidence of the agent and Collier, we hardly think it would seem as if there were any fraudulent intention to misrepresent. The desire was to get \$4,000 insurance, and it may of course be argued strongly for the company, that any marked over-estimate of cash value would materially affect the two-third or three-fourth rule.

The Courts have had to consider this question of over-valuation in many cases.

There is no warranty in this case as to value; and the Court of Common Pleas, in *Williamson v. Commercial*

Union, 25 C. P. 465, discussed the point, referring, amongst other cases, to *Riach v. Niagara Mutual Co.*, 21 C. P. 464.

In *Williamson's Case*, 26 C. P. 599, in appeal, the question is also discussed, and the difference is clearly pointed out between an honest opinion given in good faith as to estimated value, and a fraudulent or intentional misstatement.

We think we must accept the finding of the jury on this point. It was left fairly to them, and in the absence of fraud or bad faith we hardly think it fair to the plaintiff to interfere.

Then, as to the stoves. It is objected in several pleas, that it was represented that there was no stove or fire used, whereas there was a stove and fire used: that without defendants' assent the assured increased the risk by the use of fire in a stove: that he represented there were no stoves, funnels, flues, or other apparatus for heating or using fire, and afterwards, without consent, he erected a stove and used fire therein.

As already remarked, the questions and answers in the printed form were those used in insuring buildings.

No. 16. "Are the stoves, funnels, flues, &c., employed for heating or using fire properly secured? Will you engage to keep them so? Do' the pipes enter the chimney? Are the chimneys built from the ground?"

Between these questions the word "none" is written.

The agent filled up the application, and on the back is written, "No fire is used in the steamer."

Then, in answer to the question specially addressed to the agent himself, endorsed on the application, "Are there any other circumstances connected with danger of fire to the property proposed for insurance," he answers, "No," and that he can confidently recommend the risk.

It is not necessary to examine very critically the precise limits of this agent's authority, as no evidence was given to define or limit it, and in that respect the case is less embarrassed with difficulty than many others with which we have had to deal.

It is true that the application provides that if he fill up the application he shall be the agent of the applicant, not of the company ; but we do not understand that we are therefore to ignore all that passed between him and the applicant. We may resort to it, we think, to explain doubtful expressions, and to ascertain the sense in which they were understood.

The assured dealt only with the agent as representing the other parties to the contract.

The agent, Snyder, swears : " He said there was a stove on board, of course. He said it was sometimes the case that parties stayed on board the boats during the winter, but there would be no one living on board his boat. I turned to my book of instructions. He said there would be no fire lit until he would be fitting. He asked me if he could light a fire then, and I said certainly, no sane man would suppose you were not to put a fire in the stove ; that was necessary at such a time. I said it would not interfere with it. I said after steam was up the policy would be no good, but for building a fire at the time of fitting it would not affect the policy. No sane man would think so. * * I read the questions as they came in, and wrote the answers down. I presume I did ask him all the questions, but I will not swear positive. That is my handwriting : ' No fire used on the steamer, nor on any of the vessels near it.' I went to several of the vessels and found there was no fire. * * My instructions were to take risks on steamers while they were lying in winter quarters."

Collier, the applicant, fully supports these statements, that he told him of the stove, and said he might use it when he came to fit out ; and he told Collier he had a perfect right to use the stove when fitting out. He said this after turning up some printed instructions.

Without depriving defendants of any benefit to which they may be entitled under the clause as to agency, I think we have the right to read the language used in the application in the light and sense in which the parties to the document admit they regarded it. The word " none,"

written after the question, must mean, in the words of the question, that there were no "stoves, flues, and other apparatus employed for heating or using fire," not that there was no stove in the boat used or unused.

Any ambiguity induced by the form of the question and answer should not, on the well recognized rules for construing the contract of insurance, be taken too strictly against the insured, but rather be construed so as to uphold and not to destroy the intended bargain for protection.

Besides, we should read the question and answer by the light of the memorandum endorsed on the application: "No fire is used on the steamer, nor any of the vessels near it;" and on the application is also written in red ink or pencil, "Rate low, but no fire;" and in another part near some of the questions in the same red ink, "No fire."

Then we have to consider the defence as to the subsequent use of the stove.

The application is for a fire insurance on the steamer for four months from the 18th of December.

The policy describes her as "lying at winter quarters at Rathburn's wharf, at Napanee."

The insurance was to terminate on the 18th of April.

The agent fully explains how he discussed with Collier the possible use of the stove when fitting out in the spring began. His language is quoted already. During this discussion he says he turned to his book of instructions, which was produced, and which refers to the risk in fitting out, and Collier swears to the same effect.

The plaintiff swore that it was customary with all boats to use a stove when fitting out.

The printed book of instructions produced by the agent gives directions as to fire insurance on steamboats, specifying the rates, and has the words: "Risk to include ordinary refitting in spring, but to cease when steam is got up;" and again, "Note—To include refitting risk in spring. Policy to specify the kind of fuel to be burned."

Nothing could be clearer than the agent's testimony as to what took place in reference to this book; that he

distinctly told applicant that the refitting risk in the spring included the use of a fire, and that no sane man would suppose that fire would not then be used.

We think we ought to hold defendants liable for this explanation, and that the risk must be held to include the use of fire while refitting in the spring.

It would be a very harsh measure of justice not to allow such an explanation of the meaning of the words used, so distinctly given by the agent, and on the faith of which the applicant entered into the contract.

The jury found that the use of the stove was reasonably included in the term, "refitting risk in the spring." Also, that the loss did not occur by reason of the fire being lighted in the stove.

It remains to consider the objections as to the title.

Question 15 in the application is worded thus: "State fully the applicant's interest in the property, whether owner, mortgagee, or lessee, &c."

To this the answer is, "Owner," and below a statement of certain existing mortgages.

It appeared that Collier had purchased the vessel from Owens.

To enable Collier to obtain the benefit of a contract in favour of Owens not to put an opposition vessel on the route, it was arranged that Owens should retain an interest, and sixty of the ordinary sixty-four shares of a registered ship were transferred to Collier, and four shares left with Owens.

It is now insisted that a full and true statement of applicant's interest was not given, as he was in fact only a part owner.

The true state of the title was fully disclosed to the agent.

The latter says that Collier stated: "I was to give \$7,000 for the boat, but when we went to draw the writings at Kingston it was found that when Owens bought from Port the latter agreed not to run on the route for so many years. The lawyer said if he bought the boat out and out Port

might put a boat on the route at any time; therefore Mr. Owens retained four shares. With the exception of these four shares, he said the boat was worth \$7,000. * * Owens was willing to keep the other man off."

It thus appears that when Collier signed his application and paid his money, this matter was fully discussed and understood between the parties.

The jury was asked, "Did Collier make any untrue representation as to the ownership?" To which they answered, "No."

The case is happily free from any imputation of fraud, deceit, or bad faith on this branch. In such a view it is to be regretted if, on any technical ground, a fair claim for indemnity should be lost.

In ordinary estimate and opinion, a man owning sixty out of sixty-four shares in a steamboat would be held to be the owner for all purposes. The answer to the question, as framed, is not literally untrue. State fully your interest, whether you are owner, mortgagee, or lessee. His interest is certainly that of an owner—a fifteenth interest is owned by another.

It is asked by Mr. Robinson, how would it be if he only owned thirty-two or twenty-five shares instead of sixty. The answer would be, that in such a state of facts the simple statement "Owner" would naturally imply a most important concealment—a *suppressio veri* most materially affecting the extent both of the interest and of the risk.

If a man were owner of an undivided moiety of a house, worth in all £500, if he state the value of the property proposed to be insured at £250, and to a question like that before us, answers "Owner," it is strictly and literally true, and as he only gave the value of his half interest no fraud or bad faith could be imputed.

If the ownership of four shares, one-fifteenth interest, be in another, and be fatal, so the ownership in another of one share, or a sixty-fourth interest, must be equally fatal. We ought to hesitate before adopting a position so highly technical and artificial. It ceases to be technical or artifi-

cial when the alleged concealment or rather non-communication has, as above suggested, an important bearing on the risk to be undertaken and the value of the interest to be insured.

We cannot, I think, lay down a hard and fast rule, applicable to every case, that in a question and answer like that before us the non-communication of any interest, however trifling or infinitesimal, must necessarily vitiate the contract. Here there is the additional feature that the true state of the title was fully disclosed and discussed.

We do not desire to enter upon that debatable land, the authority of or notice to agents of a limited power. We must look to the wisdom of an Appellate Court for some final formula to guide us through the wilderness of cases and opinions.

It may suffice here to say that no evidence is before us of any limit to this agent's authority.

We find him used by the company as the only medium of communication with the assured. We find him fully aware of the state of the title, and discussing it with Collier; and we think, without infringing any known rule of law, we may consider that the words actually used in this question and answer were used and understood in a sense not involving any misrepresentation or non-communication of any material fact, and, in the absence of fraud or bad faith, are to be held to be true in letter and in spirit.

No authority has been cited to us directly bearing on the argument.

We feel naturally reluctant to add another to the already too numerous list of pitfalls for the unfortunate assured.

To those unacquainted with legal decisions and distinctions, it must always appear opposed to the ordinary intelligence of mankind that companies can make contracts by means of agents, accept all the benefits derivable therefrom, and at the same time repudiate every representation made by such agents, and insist that words and expressions proved by the testimony both of the agent and

the assured to have been used and understood in one sense are to be read in a different sense; that matters possibly material to the proposed risk fully communicated to the agent, and by his mistake, or by his direction, not noticed in the application, should avoid the insurance, to the possible ruin of a man whose only fault was to trust in the person employed to induce him to enter into the contract.

During the last two years the amount of litigation in fire insurances seems to have wonderfully increased.

It is time that attention should be directed to the apparently increasing perils to which persons desiring to insure are exposed.

Rule discharged.

MICHAELMAS TERM, 43 VICTORIA, 1879.

(*From November 17th to December 6th, 1879.*)

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

HICKS V. SNIDER ET AL.

Will—Construction—Estate in fee.

The testator, who died in 1832, devised as follows :—“I make and give all my property, both land, house, and all the stock, and every other article I possess or own, to my loving wife Elizabeth, making her my executrix”: Held, that the wife took an estate in fee.

EJECTMENT for part of Lot Number 15, in the 4th concession of the township of Ernesttown, in the county of Addington.

The plaintiff claimed title as heir-at-law of John Hicks, who died on the 26th of July, 1832, devising a life-estate to his widow, Elizabeth Hicks, who died within three years from the date of the issue of the writ.

The defendant Snider limited his defence to a portion of the land claimed, containing about seventy-five acres, and claimed title under a deed to him from Frederick Haycock and Joseph L. Haycock, who derived their title under a deed from Silas Shorey and Samuel Belton Shorey, who derived their title under a deed from Elizabeth Hicks to Silas Shorey, dated January 31st, 1837.

The defendant Fraser limited his defence to the residue of the land not defended for by his co-defendant. He

claimed title under a deed of the land to him from Robert Perry Wright and John Aylsworth, who derived their title under certain deeds specified.

The question was, whether Elizabeth Hicks took under the will an estate for life or in fee.

The devise was as follows: "I make and give all my property, both land, house, and all the stock, and every other article I possess or own, to my loving wife Elizabeth, by making her my executrix, to see me decently interred, and pay all my just and honest debts. I will and bequeath to my son Joshua Hicks, five pounds. I will and bequeath to my daughter Hannah Hicks, one cow, one bed and bedding. The five pounds willed to my son Joshua to be paid to him one year after my decease."

The case was tried at the last Fall Assizes at Napanee, before Patterson, J. A., when a verdict was entered for the defendants, with leave to the plaintiff to move to enter it for him.

On the 19th of November, 1879, *Wallbridge*, Q.C., for the plaintiff, the heir-at-law, obtained a rule *nisi* to enter a verdict for the plaintiff, on the ground that the testator's widow took only a life estate.

Reeve (of Napanee) shewed cause. The testator having died prior to March 6th, 1834, the question is, whether the will shews an intention to give the fee simple in the land to Elizabeth Hicks or not. The devise is either to the widow, Elizabeth Hicks, personally, for her own benefit, or it is to her, as executrix, for payment of debts, &c. If the former, then it carries the fee, on three distinct grounds: 1st. The use of the word "property" would cause the fee to pass. The words, "all my property, both land, house, and all the stock, and every other article I possess or own," are equivalent to "all my real and personal property," and would carry the fee in the land: *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121. 2nd. The mixing up the real and personal property in one clause, forming together one devise or gift, causes the fee to pass, because the testator is to be held to

have intended to give as large an interest in the real estate as in the personal, namely, the whole interest he himself had: *Hurd v. Levis*, 19 U. C. R. 41; *Doe dem. Booley v. Roberts*, 11 A. & E. 1000. 3rd. The coupling with the devise a condition, or charge upon the devisee, to pay funeral expenses and debts, causes the fee to pass. The use of the word "executrix" does not shew that the devise was intended to be to Elizabeth Hicks in her capacity as executrix, as the will was evidently drawn by a person ignorant of the proper legal significance of the term. The true meaning of the testator may be more plainly expressed as follows: "I devise and bequeath all my property, both real and personal, to my loving wife Elizabeth, (whom I hereby make my executrix,) she seeing me decently interred, and paying all my just and honest debts." This would make the will precisely like that in the case of *Dolton v. Hewen*, 6 Mad. 9, in which the fee was held to pass. Where the devise is made to a person who is also appointed executor, it is held to be a beneficial devise to the individual, and not to him as executor, unless a contrary intention appears: *Johnson v. Brady*, 11 Irish Equity 386; see also *Thomas v. Phelps*, 4 Russell 348. Where a testator made his wife *full and sole executrix* of his freehold house, situated, &c., this was held to pass the fee in the house, the interest intended to pass apparently being as large an interest as an executor takes in personalty: *Doe Hickman v. Haslewood*, 6 A. & E. 167. See also *Doe v. Richards*, 3 T. R. 356; *Doe Stevens v. Snelling*, 5 East 87. If, however, the devise was made to Elizabeth Hicks, as executrix, for payment of debts, &c., then, if it was necessary to sell the land for payment of debts, the fee vested in her with a power of sale, in which case the *paper* title derived from her by the defendants is good; or, if a sale was not necessary, the estate of the executrix (termed in the text books a "base fee") passed at once to the heir-at-law, and he should have brought his action over forty years ago, in which case the defendants' *possessory* title is good. Moreover, the conveyances from Elizabeth Hicks passed a good

title, even if a sale was not necessary for payment of debts, &c., because the defendants, being *bonâ fide* purchasers for value, were not bound to inquire whether there were debts or not: *Burke v. Battle*, 17 C. P. 478, following *Stroughill v. Anstey*, 16 Jurist 671. The fact that the will gives a legacy of five pounds to the plaintiff, the heir-at-law, though not of very much weight by itself, is a circumstance entitled to some consideration in connection with the stronger grounds before mentioned.

Wallbridge, Q. C., contra. The Court will not presume that the testator intended to disinherit the heir, as must be the case if effect be given to the construction contended for. He referred to *Shaw v. Bull*, 12 Mod. 592; *Noell v. Hoy*, 5 Madd. 38; *Doe Walker v. Walker*, 3 B. & P. 375. The word "property" is very material. In *Barnes v. Patch*, 8 Ves. 604, it is called an equivocal word. *Hockley v. Mawbey*, 1 Ves. 143. *Doe Ryall v. Bell*, 8 T. R. 579; *Doe Callow v. Bolton*, 2 W. Bl. 1045; *Denn d. Moore v. Mellor*. 5 T. R. 558.

December 3, 1879. HAGARTY, C. J.—We have examined the authorities relied on by Mr. *Wallbridge*. They are nearly all commented on in 1 Jarman 693, *et seq.*

We are of opinion that the wife took an estate in fee.

It seems unnecessary to enter upon a citation of the mass of cases bearing on this point.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

GAUTHIER V. WATERLOO INSURANCE COMPANY.

Insurance—Further insurance—Mistake.

Contrary to the statutory condition in a policy issued to him by defendants, the plaintiff, who was illiterate, being told and induced to believe by the agent of the M. company that plaintiff's policy had expired, effected another insurance on the same property with the M. Co., and received from the agent the usual interim receipt for thirty days, acknowledging payment of the premium, for which the plaintiff gave his note instead of money. After the fire, which happened within the thirty days, the agent, with whom plaintiff had effected the further insurance, discovering that the policy issued by defendants had not in fact expired, withdrew plaintiff's application for the insurance with them, and got back the interim receipt from him :

Held, that the condition was nevertheless broken, and that plaintiff could not recover : that the question whether there had been in fact any subsequent insurance at all, by reason of the premium having been, contrary to the rules of the company, paid by note instead of in money, could not be determined in this suit, particularly as the company had admitted their liability by paying an insurance effected at the same time on plaintiff's furniture, the premium on which had been covered by the same note.

ACTION on a fire policy, dated 8th July, 1877, for \$1000, continued by renewal for a year from 1st July, 1878.

The 2nd plea set out the statutory condition as follows:

"The company is not liable * * if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorized agent;" averring that about the 25th January, 1879, the plaintiff effected another insurance in the Mercantile Fire Assurance Company, for \$1000, on the same property, for twelve months from 5th February, 1879, which was in full force when the fire occurred, and that defendants never assented thereto.

Replication, on equitable grounds, that plaintiff did not in fact and never intended to effect another insurance, but being illiterate, he was imposed upon by the Mercantile Insurance Company, by their representing to him that his policy with defendants had expired; and that he, in total ignorance of the fact that defendants' policy was in force, made an application, prepared by the Mercantile Company's agents, for insurance, but no money was paid for premium,

but his note given therefor, contrary to their rules, whereby the plaintiff acquired no right to have or demand a policy : that no policy was issued, and his note was returned to him, and therefore there was no insurance with them, &c.

Defendants took issue on this, and the plaintiff took issue on defendants' second plea.

The case was tried at Sandwich, before Morrison, J., without a jury.

It appeared that the plaintiff was an illiterate man : that about the 25th January, one Richmond, agent for the Mercantile Company, and Conolly, who also acted for that company, and who was in the habit of doing various business for plaintiff, met at plaintiff's store, and it was represented to him chiefly or wholly by Conolly that his policy with these defendants had expired. He said no, but could not then lay his hands on it, and he was persuaded by him or them that it was so.

Three insurances with the Mercantile were then agreed on ; \$1000 on the property now in question, \$500 on furniture therein, \$825 on some other property. Plaintiff said he had no money, but they agreed to take his note, and Conolly was to pay it for him out of moneys to be received. His note was for \$23.63, to Richmond's order, at twenty days, witnessed by Conolly.

An application was prepared for him to the Mercantile Company for \$1000 on these premises, premium \$12.50, to which he put his mark. It stated that there was no other insurance.

An interim receipt was given to him, signed by Richmond, acknowledging payment of \$12.50 premium, setting out his application, and stating that unless previously cancelled it bound the company for thirty days from date, 25th January, 1879, If declined, the amount received would be refunded, less premium for the time insured, and if confirmed, a policy would be issued in due course.

On the 14th February, and within the thirty days, the premises were burned. The agent had sent the application to the head office in due course.

After the fire Richmond was told by Conolly there was a misapprehension, and that the Waterloo Insurance had not expired, and they agreed that the only thing to be done was to withdraw the application to the Mercantile, as made in error, and to give up plaintiff's interim receipt, and to telegraph the managers of the Mercantile that the application was withdrawn, and that plaintiff could then proceed against these defendants. Richmond said that plaintiff fully acquiesced, and accordingly gave up his interim receipt, and his company, of course, waived the \$12.50 premium, but the balance of the note was paid. The Mercantile paid the plaintiff his loss on the furniture.

Plaintiff appeared to have demurred to giving up his receipt and claim in the Mercantile. His statement was, that they told him it was worthless, that he had paid no money. It was also stated that one Hughes, agent or inspector for these defendants, told him, after hearing the different stories, that he was not to blame, and that defendants would pay.

On this evidence a verdict was entered for plaintiff, the learned Judge giving his reasons in writing as follows:—

"I think the plaintiff is entitled to recover. The main question for my determination is with respect to the effecting of the policy with the Mercantile Company, during the currency of the policy declared on. I find, at the time the application for insurance with the Mercantile Company was made, that Connolly, who had previously acted for the defendants' company, and who effected the renewal in the defendants' company of the policy now in question, informed and induced the plaintiff (who is illiterate) to believe that his policy with the defendants' company had expired: that the plaintiff had expressed his desire to have it renewed in defendants' company: that Connolly and Richmond, who is agent of the Mercantile Company, said they would insure him in a better company: that the plaintiff, believing that his policy with defendants had expired, signed an application, drawn up by Connolly, for the risk in the Mercantile Company, at the same time two other insurances on other property were effected, and, not having the money, he gave his note

to Richmond personally for the premiums: that after the morning of the fire he was told that the risk in the Mercantile Company was taken under a mistake, the agent telling plaintiff that the defendants' policy existed, and that being so he cancelled the risk, and the plaintiff gave up his interim receipt, and plaintiff was released from paying the \$12.50 premium. I find that the plaintiff acted *bonâ fide* throughout. I find also that the plaintiff did not in his claim papers fraudulently or falsely declare that there was no other insurance; and as to the equitable replication, I find the facts proved as stated therein. I am also of opinion that the plaintiff did not effect a second insurance within the intention and meaning of the condition relied on in the defendants' policy. I notice on the back of the plaintiff's claim papers that the local agent of defendants reported in favour of this claim, and I find that the defendants' inspector did also: that the latter when he saw plaintiff after the fire got plaintiff to make out his claim papers, stated to the plaintiff that he was unblamable, and that he would be paid. I cannot understand any company, which has any respect for its character, refusing to pay such a claim. On the whole, I find for the plaintiff \$1,000, which amount was not disputed."

November 20, 1879, *Clement* obtained a rule *nisi* to enter a verdict for defendants.

December 4th, 1879, *Crickmore* shewed cause, contending that there had been no infringement of the condition in the policy, the alleged subsequent insurance never having in fact been carried out: that it was an entire mistake, on the discovery of which the insurance was at once repudiated, and that there was no insurance at all, as the acceptance of a note for the premium was contrary to the rules of the company. He cited *Park v. Phoenix Ins. Co.*, 19 U. C. R. 110; *Walker v. Provincial Ins. Co.*, 7 Grant 137, S. C. 8 Grant 217.

Richards, Q. C., and *Clement*, contra, contended that whether there was or was not a mistake, there was a subsequent insurance effected which violated the condition and avoided the policy.

December 27, 1879. HAGARTY, C. J.—It was strongly pressed upon us by Mr. *Crickmore*, that the condition in the policy was not in fact violated: that the alleged insurance with the Mercantile Company was never completed, was caused wholly by a mistake, was abandoned promptly on the mistake being discovered, and was in fact no insurance: that it was void by the rules of the company, no money having been paid, &c.

We are satisfied that the plaintiff acted in good faith, and never intended to violate the condition.

The clause reads: "The company is not liable for loss, * * if any subsequent insurance is effected in any other company, unless and until the company assents thereto by writing, signed by a duly authorized agent."

There never has been the required assent by the present company.

We have to consider whether there has been a further insurance.

On the 25th of January, three weeks before the fire, there was the ordinary application to the Mercantile Company for insurance; the usual interim receipt covering the property for 30 days acknowledging the due payment of the premium.

This remains, in no way disclaimed by the Mercantile Company till after the fire, which was within the 30 days.

We are asked, amongst other things, to hold this was no insurance, as the premium was not in fact paid.

I think it is not in this suit that the liability or non-liability of the Mercantile Company on such an objection is to be discussed or settled.

I adhere fully to the view expressed on this point by the Court of Common Pleas, in *Mason v. Andes Ins. Co.*, 23 C. P. 37.

It is worthy of note that the Mercantile fully admitted their liability by paying the \$500 on the furniture insured at the same time, and notwithstanding the non-payment of the cash premium.

It is also urged that the further insurance was wholly a

mistake, unintentional, on the part of either insurers or insured.

If the Waterloo Company had, the day before the fire, become hopelessly insolvent, is there any doubt but that the plaintiff would have pressed his claim on the Mercantile Company? He intended, however mistakenly, to effect insurance with the latter and they with him. After the fire the Mercantile Company was, and naturally would be, only too anxious and willing to cancel and undo, as far as possible, all that was done. But whether by mistake or not we do not see how that is to prevent these defendants from saying, as they do, that another insurance was made without their assent.

As to the replication being proved, it merely states certain matters of evidence, and concludes, like the old *et sic*, as a conclusion from these statements, that there was no insurance as pleaded, or in other words, that the alleged insurance was no insurance in fact within the condition.

On this issue was taken.

A demurrer might possibly have been the more proper course. But it is by no means clear that the replication was in fact proved, nor that issue was not properly taken on the alleged facts, as, for example, that there was no insurance binding on the Mercantile Company, a matter not conveniently determinable in this action. In any event, the whole facts were given in evidence, and we cannot, from any possible defect on a point of special pleading, avoid giving judgment on them, with any necessary amendment.

Had a false report been received that the Waterloo Company had become insolvent, and thereupon insurance had been effected with another company, also believing the report, I hardly see how, on the truth being discovered, the Waterloo Company would be debarred from urging a breach of the statutory condition.

The plaintiff fully intended to effect insurance with the Mercantile Company. His belief that his insurance with the Waterloo Company either had expired, or was worthless in consequence of their reported insolvency, does not

seem to furnish any answer to the alleged breach of condition.

It is a most unfortunate case.

On a late occasion this Court attempted to soften the iron letter of this condition, where no bad faith, or intention to violate, was suspected. Our judicial weakness was promptly rebuked by the Appellate jurisdiction, and our error corrected. See *Parsons v. Standard Ins. Co.*, 4 App. R. 326. Possibly we may now be erring in the opposite direction. We must, however, wait till the golden mean of decision be formulated by a less fallible judgment than our own. . . .

We think the rule to enter a verdict for defendants must be made absolute.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute.

BOOTH V. WALTON.

Setting off judgments.

This suit was tried on the 15th of April, before a Judge, who gave his verdict for the plaintiff on the 16th of May, on which judgment was entered against defendant on the 10th of June, 1879. On the 29th of May all proceedings were stayed by order until the determination of an action, arising out of the same transaction, which had been begun in the County Court by defendant against plaintiff on the 1st of January. This action was tried on the 8th of July, when the defendant (plaintiff therein) obtained a verdict, and on the 27th August, judgment having been entered thereon, an order was made setting off the judgments. *Held*, that the proceedings should not have been stayed, and the order was rescinded.

This was an appeal from an order made by Dalton, Q. C., in Chambers.

The facts were as follow :—The plaintiff was engaged by the defendant to manage a cheese factory. The defendant refused to pay plaintiff's wages, alleging that the latter had been guilty of negligence in his duties, whereby the defendant incurred loss, the plaintiff having allowed milk furnished to the factory to sour, and then made it into cheese, which was unmarketable. The present action was then brought by the plaintiff for his wages, and the defendant pleaded the above defence by way of set-off. The defendant Walton then sued Booth, the plaintiff, in the County Court, for damages caused by the alleged negligence.

On the 29th of May, 1879, a summons was granted by Mr. Dalton, returnable one day after service, calling on the plaintiff to shew cause why all proceedings should not be stayed until the determination of the action pending in the County Court by the defendant against the plaintiff.

This summons was enlarged several times, each with a stay of proceedings. Judgment had been entered in this suit on the 10th of June, 1879, plaintiff having been for the time relieved of the stay of proceedings to enable this to be done.

On the 8th of July following the County Court suit was tried and a verdict obtained against Booth at Walton's suit.

On the 10th of July Booth assigned to Mr. Hatton, his attorney, the judgment obtained against Walton in this Court, to secure to him costs as between attorney and client in this action, and the costs of defence in the County Court action, in which Walton had obtained a verdict.

On the 27th of August following, after all the enlargements and the entry of judgment in the County Court suit, Mr. Dalton made an order setting off the judgments.

On the 4th of September, Osler, J., after hearing, declined to interfere.

The case of *Booth v. Walton* was tried at Peterborough, before Morrison, J., about the 15th of April last, who reserved his decision till the 16th of May.

During Easter Term defendant applied to this Court for a nonsuit, which was refused.

On the 1st of May he commenced the County Court action, on the alleged ground that he was not allowed to give evidence of the plaintiff's breach of agreement in the Queen's Bench suit.

December 1, 1879. *Hector Cameron*, Q. C., for the appeal. The whole point is, that staying the execution did not stay the assignment. He referred to *Arch. Pr.*, 12th ed., 725.

Watson, contra. There is an equity, the right of set-off, which the Court will recognize. A verdict may be set off against a judgment: *Orr v. Spooner*, 19 U. C. R. 601; *Taylor v. Cook*, 1 Younge 201; *Thompson v. Miller*, 4 Grant 481; *Simpson v. Lamb*, 7 E. & B. 84.

December 27, 1879. HAGARTY, C. J.—We have perused the evidence and finding of the learned Judge in this case, and have conferred with him, and feel some surprise that such a recovery was had in the County Court, unless very different or additional evidence was adduced besides that given before Mr. Justice Morrison, before whom we should have thought the whole case was gone into, and all that was rejected was evidence as to the value of the material, viz., the milk, &c., furnished to the factory.

The learned Judge's remarks, in giving judgment, are not favourable to the defence.

We notice the apparent merits merely as bearing on the question whether the Court should have leaned towards stretching the principle that governs the off-setting of judgments on the materials before us.

The plaintiff's proceedings were in effect stayed from an early day in June, five or six weeks before even the trial of the County Court suit, which was not commenced till a fortnight after the trial before Mr. Justice Morrison.

We have carefully examined all the authorities cited, and others also, and can find nothing to warrant such an exercise of power in a common law action.

Except the very wide language of Alexander, C. B., in *Gale v. Luttrell*, 1 Y. & J. 180, we have seen nothing supporting such a course. That was in a very peculiar equity suit, where a fund was ordered into Court and proceedings on a decree stayed till the result of a cross bill. It is only necessary to read the facts in that case, which were very extraordinary, to shew why the Court felt bound to interfere to protect the fund.

This case is referred to by Mr. Justice Byles, in *Alliance Bank v. Holford*, 16 C. B. N. S. 463. Sir W. Erle had at the trial certified to stay execution till the fifth day of the following term, in a suit where A. obtained a verdict against his bankers for cash balance, and in the meantime their cross action for bills discounted ripened into judgment. The defendant Holford had become bankrupt. The judgments were ordered to be set off. They complained of this stay of execution. What Erle, C. J., did was held to be a strict legal right, as he had control over the proceedings at *Nisi Prius*.

The decision falls wholly short of the present case.

Masterman v. Malin, 7 Bing. 435, was referred to. The plaintiff had been nonsuited, with costs to the defendant. He asked the Court to set them off against costs to be taxed in a suit of his, ejection against the defendant, in

which he had obtained a verdict, but was then before the Court on rule *nisi* for a new trial. The Court were willing to allow a brief suspension, saying they would proceed at once to hear the ejectment rule. Afterwards no order was made.

This case is referred to by Draper, C. J., in his careful judgment in *Lynch v. Wilson*, 3 Pr. R. 169, where he speaks of the claim to set off judgments as not founded on a right given by law, but as an appeal to the equitable powers of the Court.

This is also its definition in *Simpson v. Lamb*, 7 E. & B. 89. Lord Campbell says: "There is no strict right to such a set-off, and the proposition that the Court is bound to order it, whatever may have intervened between the one judgment and the other, is wholly untenable."

Orr v. Spooner, 19 U. C. 601, may also be referred to; and the rule laid down in *Garrick v. Jones*, 2 Dowl. 159, was noticed, where a man who had obtained a verdict, and which was moved against, was refused the right of set-off against a judgment recovered against him by the defendant in the other case.

If it be right to stay proceedings on a judgment regularly obtained till a cross action, just commenced and not tried till long after, should be ultimately decided, we do not see where it is to stop, and to what distance of time is the stay to extend. The fact that the cross claims may arise out of the same transaction as that on which the judgment was founded, or the alleged solvency or insolvency of one of the parties, ought not alone to warrant such an extraordinary stretch of the equitable jurisdiction of the Court.

We think it far safer, in the interests of public justice, not to establish a precedent such as is here asked. We can hardly conceive anything more inconvenient than the tying up of a judgment regularly obtained until some future day, when a suit either just commenced, or about to be commenced, may be determined.

We think the order to stay should not have been granted. Mr. Justice Osler, with whom we have conferred, now con-

curs in regarding it as going beyond any previous decision, and as unwarranted by the hitherto recognized practice of the Court.

In the view we have taken we have not thought it necessary to discuss the merits of Mr. Hatton's assignment. He may settle that with his client.

Rule absolute to rescind order, with costs.

MCINTYRE V. NATIONAL INSURANCE COMPANY OF MONTREAL.

Insurance—Policy issued in Montreal—R. S. O. ch. 162, sec. 3—Statutory conditions.

Held, that a policy of insurance issued by a company whose head office was in Montreal, and signed by their president there, and countersigned by the local agent in Ontario, where the property insured was situated, was within R. S. O. ch. 162, sec. 3.

Held, also, following *Parsons v. Citizens' Ins. Co.* and *Parsons v. Queen's Ins. Co.*, 4 App. R. 96, 103, that the conditions of the policy not being, in accordance with the statute, headed either "Statutory" or "Variations," the policy was one without conditions; and the condition as to arbitration could therefore form no defence.

ACTION on a fire policy dated the 4th of July, 1877, insuring one Forrest in a stock of dry goods, &c., for \$1,500, for a year, in the village of Embro, which was renewed for a second year.

Averment, that the policy was subject to the Fire Insurance Act of 1876, and as against the assured was not subject to statutory or other conditions, as they were not printed, &c., as required by the Act,

Averment of loss by fire on the 2nd of April, 1879, and notice and proof of loss to defendants as soon as practicable, and that no objection was made thereto: that after the loss Forrest, by writing, assigned the chose in action to the plaintiff; with a general averment of performance of conditions.

Pleas :

1. *Non est factum.*

2. That the policy was made and entered into at Montreal, and was not subject to the Fire Insurance Act of 1876.

3. Traversing the loss.

4. Denial of notice of loss.

5. That Forrest did not as soon as practicable deliver proof and particular account of the loss.

6. That defendants did notify him of objections to statement and proof.

7. Denial of assignment to plaintiff.

8. Arson.

9. That in the policy it was provided, that if differences should arise touching any loss or damage after proof had been received, the matter should, at the written request of either party, be submitted to arbitration, which should bind the parties as to the amount of loss, but the arbitrators were not to decide the liability under the policy, and that no suit or action should be sustained till after the award : that before action brought differences had arisen, and after Forrest had sent in his proof of loss, the defendants duly gave notice to him that they required arbitration under the terms of the policy, but Forrest refused to refer, and commenced this suit ; wherefore defendants prayed judgment of the writ and declaration that they might be quashed.

10. This and the 8th plea were struck out at trial.

Issue.

The trial took place at Woodstock, before Galt, J.

The policy appeared to be signed and professed to be signed by the President at Montreal, and with the words, "But this policy shall not be valid until dated and countersigned by J. C. Nosworthy, the agent of the company for insurance of property in the town of Ingersoll and its vicinity ; and it was "dated and countersigned at Ingersoll this 6th of July, 1877. J. Nosworthy, Agent."

The renewal receipt was signed, "A. W. Ogilvie, President.

This renewal not to be valid until countersigned by J. C. Nosworthy, the agent of the National Insurance Co."

"Dated and countersigned at Ingersoll this 10th July, 1878. J. C. Nosworthy, Agent."

The learned Judge found as follows:

1. I find a verdict for plaintiff on the 1st plea.
2. I find that the policy was made in the City of Montreal. I submit the latter part of the plea to the judgment of the Court.
3. I find the property was destroyed by fire as alleged.
4. I find that Forrest did as soon after the fire as was possible, give notice of his loss to defendants.
5. And as soon after the fire as possible deliver proof of his loss to defendants.
6. I find that defendants did not notify Forrest that his proofs were objected to, otherwise than by notice of arbitration.
7. I find that Forrest did assign and transfer his claim to plaintiff.
8. I find that before the commencement of the suit defendants did demand an arbitration as set out in 9th plea, and that the facts set out in that plea have been proved. I therefore find a verdict for defendants on that plea, reserving leave to plaintiff to move to enter a verdict for \$1,533, if the Court shall be of opinion that the plea or the facts stated afford no defence.

November 19th, 1879. *Macmahon* Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff, with leave to add a replication to the 9th plea, that the demand for arbitration was subsequent to the time when the loss was payable.

J. K. Kerr, Q. C., obtained a cross rule to enter a verdict for defendants, on the first and second pleas, on leave reserved.

Both rules were argued together.

McMahon, Q. C., shewed cause to the cross rule, and supported his own, citing *Ulrich v. National Ins. Co.*, 42

U. C. R. 141, 161; 4 App. R. 84, 88; *Frey v. Wellington*, 43 U. C. R. 102; R. S. O., ch. 161.

J. K. Kerr, Q.C., contra, contended that the plaintiff was concluded by the contents of the body of the policy. He referred to *Geraldi v. Provincial Ins. Co.*, 29 C. P. 321; *Johnston v. Western Ins. Co.*, 4 App. R. 281; *McInnes v. Western Ins. Co.*, 30 U. C. R. 580.

December 27, 1879. HAGARTY, C. J.—The R. S. O., ch. 162, sec. 3, says: "The conditions set forth in the schedule of this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereafter entered into or renewed, or otherwise in force in Ontario, with respect to any property therein, and shall be printed in every such policy with the heading, "Statutory Conditions."

The point that this company being chartered by the Dominion Government, and therefore not under the Ontario Act, has been disposed of by the Court of Appeal: *Parsons v. Citizens' Ins. Co.*, and *Parsons v. The Queen Ins. Co.*, 4 App. Rep. 96, 103.

We cannot hold that because their head office may be in Montreal, and some of their officials sign the formal policy there, not to take effect till countersigned by their local agent in the part of Ontario where the property insured was situate, that it does not come under the Ontario Act affecting every policy "entered into or renewed, or otherwise in force in Ontario, with respect to any property therein."

We hold it to be within our statute.

Then as to the arbitration clause. On the face of the policy they contract: "The amount of loss or damage to be estimated according to actual cash value, and to be paid in sixty days after the proof of the same required by the company shall have been made by the assured and received at this office, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy."

This is in the contracting part, and before the mention of any conditions.

The conditions are very numerous, not headed either as "Statutory," or "Variations."

There is no pretence of assimilating these conditions to those prescribed by the statute.

There is a clause as to arbitration set out in the 9th plea, but it differs in many respects from the Statutory arbitration clause.

We are bound to hold, in accordance with the decisions of the Court of Appeal, that this is a policy without conditions.

Therefore, if we read this policy as one without conditions, the words, "and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy," cannot be used to answer this action, as the policy contains no controlling or qualifying provisions.

In this view the defence fails, and the rule must be absolute to set aside the verdict for defendants and enter a verdict for the plaintiff, on the leave reserved, for \$1,533.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute.

CANTY V. CLARKE ET AL.

Work and labour—Agreement to pay according to certificate of engineer.

Defendants agreed with the plaintiff to pay him for work to be done by him according to the certificate of the engineer of a certain railway that the work had been fully completed, and not otherwise: *Held*, that the plaintiff was bound, in the absence of fraud or undue influence, by the certificate of the engineer, and could not dispute the same.

SPECIAL CASE, stated by an arbitrator for the opinion of this Court.

The facts were as follow:—

The plaintiff was a contractor under defendants to do certain work on a railway on which they also were contractors for the same and other work. Under plaintiff's

contract the chief engineer of the railway was also engineer in charge.

Under the contract and specifications signed by plaintiff with defendants, certain grading, clearing, and grubbing, were to be done at specified prices per yard or per acre, as stated. Plaintiff agreed to execute the work according to the profile prepared by the engineer and the specifications: that he would "conform to the plans and specifications and directions of the engineer, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under the contract shall be determined, and who shall have full power to reject and condemn all work or materials, or both, which in his opinion do not conform to the spirit of this agreement, and shall decide every question which may or can arise between the parties hereto relative to the execution thereof, and his decision shall be conclusive."

Very full powers of rejection and interference with the work were given.

By sec. 8 the defendants agreed "that upon the certificate of the engineer that the work contemplated to be done under this contract, has been fully completed by the said party of the second part, and not otherwise, they will pay said party of the second part for the performance of the same in full for material and workmanship as follows," setting out the prices.

"Estimates shall be made during the progress of the work, &c., and payments shall be made upon the estimate and certificate of the engineer, and not otherwise * * for the amount and value of work done and materials furnished during the previous month, 10 per cent. being deducted and retained until the final completion of the work embraced in this contract to the satisfaction of the said engineer, when all sums due the party of the second part (the plaintiff) shall be fully paid and this contract considered cancelled."

The work was completed in November 1877, and a final certificate or estimate was given by the engineer,

setting out quantities of earth excavation, acres cleared, &c., &c.

The plaintiff disputed these quantities, and the engineer's measurements.

The question submitted for the opinion of the Court was, whether the plaintiff could claim any greater or other sum than that certified by the final estimate of the chief engineer of the railway, assuming no fraud or undue influence used to obtain the withholding or granting of such certificate.

December 2, 1879. *Idington*, Q. C., for the plaintiff, cited *Pegg v. Nasmith*, 28 C. P. 330; *Ferguson v. Galt*, 23 C. P. 66; *Edwards v. Aberayron Mutual Ship Ins. Co.*, L. R. 1 Q. B. D. 563.; *Jones v. St. John's College*, L. R. 6 Q. B. 115; *Dawson v. Fitzgerald*, L. R. 1 Ex. D. 257; *Griggs v. Billington*, 27 U. C. R. 520.

R. Smith, contra. The engineer's certificate is binding, and is a condition precedent to the right to sue: *Ferguson v. Corporation of Galt*, 23 C. P. 66; *Eakins v. Corporation of Bruce*, 30 U. C. R. 48. It is not an arbitration, but a valuation, and defendants are only liable for the value ascertained by the engineer. Some cases seem to regard as a test the question whether a dispute must arise before reference, as *Bos v. Helsham*, L. R. 2 Ex. 72; but the true test seems whether the referee must take evidence to enable him to arrive at a decision: *Mills v. Bayley*, 2 H. & C. 36; *Collins v. Collins*, 26 Beav. 306; *Turner v. Goulden*, L. R. 9 C. P. 57; *In re Hopper*, L. R. 2 Q. B. 367. The authorities cited for plaintiff do not support his contention. In *Dawson v. Fitzgerald*, L. R. 1 Ex. Div. 257, a regular reference with appointment of umpire was provided to determine matters in dispute, which could only be determined by evidence. *Pegg v. Nasmith* is a decision on pleading merely. The engineer here had power to reject any work. No quantity is specified in the contract, only the rate per yard, &c. The work as to quantity and quality was wholly within the discretion of the engineer. Who else then could determine?

December 27, 1879. HAGARTY, C. J.—I shall not attempt to go through the list of cases so often cited in a contention of this nature, nor can I assert that they can all be easily reconciled. One principle can, I think, be safely adopted, viz., that we are bound to endeavour to ascertain the meaning of the parties to a contract like this.

I have no doubt whatever as to the meaning of the parties. I do not think the defendants entered into any contract to pay plaintiffs for such quantities of work as he could prove by outside testimony that he should perform, or that they would pay him generally. I think they contracted to pay him for such grading and clearing, &c., as the engineer in charge should find and certify that the plaintiff had done; in other words, that their promise is a qualified and not a general promise—not to pay whatever jurors, or judges, or arbitrators should decide to be the extent of his work. Each party agreed to a named authority—the engineer of the company—and for better or for worse, so long as he acted in good faith, they all accepted his judgment and estimate to be conclusive.

The defendants could not object if he found quantities larger than they could prove existed in the judgment of other engineers. The plaintiff is, I think, equally bound.

If I be right in assuming the contract to be thus qualified there is an end of plaintiff's contention.

It is impossible to believe that men under contract with the company, and bound completely to the judgment of that company's engineer, could—except by some utter heedlessness of their own interests—place themselves at the mercy of any other person's judgment or opinion as to the quantities of the work.

I think the language used in their bargain with plaintiff will be sufficient to keep them from such a difficulty.

ARMOUR and CAMERON, JJ., concurred.

HARRISON V. PINKNEY.

Lease—Proviso for determination—Option to pay for the crop or work—Construction.

Plaintiff leased certain premises from D., agreeing to give up possession on receiving six months' notice if D. sold during the term, with the right, if he had any crop in the ground, of harvesting it, or if not to be paid for the summer fallow. In August of the first year, before a crop was put in, D. sold to defendant, of which the plaintiff had notice, and that possession would be required on the 1st of April. Defendant refused to pay the plaintiff for the crop subsequently put in by him, and converted it to his own use:

Held, that the plaintiff was entitled to recover, in trover, from defendant the value of the crop so converted; CAMERON, J., dissenting, on the ground that the plaintiff's remedy was against the lessor, not against defendant.

Held, also, that the option to pay for the crop or for the summer fallow was to be exercised by the lessor.

Semble, per CAMERON, J., that it might be exercised at any time before harvesting.

TROVER for wheat.

Pleas, not guilty, and denial that goods were plaintiff's.

Issue.

The case was tried at the last Assizes at Bampton, before Morrison, J. A., and a jury.

It appeared that one Jonathan Dunn, by lease, dated 28th February, 1877, demised to the plaintiff certain farm land for three years from the 1st April, 1877, at a half-yearly rent.

Among the lessee's covenants was this provision: "The lessee to have permission to remove and sell four tons of hay each year during the said term, and will summer fallow ten acres, and when leaving to have the crop off said ten acres, or to be sold as agreed upon between ourselves, or by arbitration, if price cannot be settled; all straw and manure to remain on the premises." * * *

Towards the end of the lease were these words: "And the said lessee agrees to give up possession of said premises

before expiration of lease, if sold by said lessor, upon receiving six months' notice, said notice to be given before the 1st April.

* * * "And should the said lessor give the said lessee notice to quit premises during any year of said lease, then the lessee to have the privilege of harvesting and threshing the following crop of the summer fallow, or the work done on said fallow will be paid for at a fair and reasonable valuation."

On the 22nd August, 1877, during the first year of the term, Dunn entered into an agreement with the defendant for a sale of these premises, possession to be given on the 1st April following.

On the same day Dunn's solicitor notified plaintiff of the sale, and that possession would be required on the 1st April next, and that plaintiff should be ready to deliver possession on that day.

On the 1st April, 1878, Dunn conveyed in fee to defendant Pinkney.

When the plaintiff got notice in August he had the summer fallow prepared, but no wheat was sown. He had some conversation with both Dunn and defendant, but not amounting to much. He sowed fall wheat in this fallow, and remained in till the 1st of April, when he left and defendant entered.

In harvest time he went to cut the wheat; defendant objected, but the plaintiff cut it, and the defendant drew it into the barn, threshed it, and kept it as his own.

It did not appear that either Dunn or the defendant ever offered the plaintiff to pay for his work.

Dunn was not examined. It was objected for the defendant that the plaintiff could not recover: that the action should have been against Dunn; and that the plaintiff had the notice before he sowed the wheat.

The learned Judge reserved the question of liability for the Court, and the jury assessed the damages at \$207, for which a verdict was entered.

May 22nd, 1879. *Tilt* obtained a rule *nisi* to enter a nonsuit or verdict for the defendant, on the grounds: 1. That the wheat belonged to the defendant and not to the plaintiff. 2. That the covenant in the lease between Dunn and the plaintiff did not run with the land, and therefore the defendant would not be liable for the conversion of the wheat. 3. That the said covenant was a personal covenant, for breach of which Dunn was alone liable. 4. That the deed from Dunn to the defendant carried with it the growing crops, and gave the defendant a good title thereto. 5. That the lease under any circumstances gave no title to the plaintiff to any wheat remaining in the ground after the expiration of the lease, there being the alternative to pay for the work at a reasonable valuation, or for a sale, as agreed upon, or by arbitration.

Jas. Fleming shewed cause. The lease provides that in case the lessor sells, the tenant shall give up all but what he may have summer fallowed, and as to that he has an extension of time, until he harvests his crop, at his option. Even if the landlord had the option he was bound to exercise it, and not having done so the wheat belongs to the tenant. There was no action against the original lessor, nor any breach of covenant on his part. He cited *Robinson v. Fee*, 42 U. C. R. 448; *Burrowes v. Cairnes*, 2 U. C. R. 288; *Eckhardt v. Raby*, 20 U. C. R. 458; *Doe dem. Wilson v. Phillips*, 2 Bing. 13.

Tilt, contra. The agreement for the sale of the land was made on the 22nd of August, 1877. The plaintiff was aware of the sale. There was no reservation of the crops. Dunn gave the plaintiff notice that he had sold the land, and that he would require possession on the 1st of April following. There were no crops in the ground, and the plaintiff had no right to sow the crops. If he did so, he must have done it relying on the covenant in the lease between him and Dunn, which is only a personal covenant. The deed was executed on the 1st of April, 1878, and at the time of the execution the crops were sold to the defendant, and the deed would carry them independently. See

Wood v. Lang, 5 C. P. 204; *Robinson v. Fee*, 42 U. C. R. 448; *Murton v. Scott*, 7 C. P. 481; *Grey v. Cuthbertson*, 2 Chitty 482.

December 27th, 1879. HAGARTY, C. J.—We may assume that the option mentioned in the lease was to be exercised by the lessor. It seems clear that neither Dunn nor the defendant ever attempted to exercise it.

The plaintiff then acts on the other branch of the bargain and sows the wheat. He is allowed to do this without any distinct notice or warning, or offer to make any other arrangement.

It seems to me that we should consider his position after the 1st of April either as having, as it were, an extended or continuing term in the land sown until harvest or removal of the crop; or that he had a license under seal for value, irrevocable, to enter and harvest, binding as much on the defendant, who had purchased the reversion with full notice, as on Dunn, the original lessor.

In either view, I think the plaintiff can recover. I do not think he must be left to his remedy as against Dunn, nor can I regard it as merely a personal covenant between Dunn and the plaintiff.

The term was for three years. It was determinable on a six months notice, with a right to the lessee either to be paid for his work done, or reserving to him a right and license to enter and harvest his crop.

I think the verdict may stand. *McGinnes v. Kennedy*, 29 U. C. R. 93, and the remarks of Richards, C. J., may be referred to.

ARMOUR, J., concurred.

CAMERON, J.—The rights of the parties depend upon the proper construction and effect of the following provisions in the lease to the plaintiff from Dunn, the plaintiff's lessor and defendant's vendor. [The learned Judge here set out the above provision as to giving up possession of the premises, and continued:]

The first difficulty is, to determine with whom lay the option to allow the harvesting and threshing of the crop, or to pay for the work done. In my judgment it rested with the landlord, and not with the tenant. Secondly, when was the option to be exercised; at the time of giving notice, the expiration of the lease, or at the time for harvesting? I think it continued with the landlord up to the time of harvesting. If the option was a valuable one, it gave the opportunity to the landlord to judge by the appearance of the grain whether it would be more to his interest to pay for the labour expended by the tenant in preparing the ground and sowing the seed, or to allow the tenant to reap himself.

It was not in the contemplation of the parties that the lessor was to pay for the grain, as grain; it appears manifest, by their using the words, "Work done on said fallow to be paid for at a fair and reasonable valuation." It may be that the plaintiff's right of action against his landlord became perfect when the latter conveyed to the defendant without making any reservation of the right of the plaintiff to harvest the crop of the summer fallow, the legal effect of the deed being to vest in the defendant the grain, unless his rights in that respect were defeated by his knowledge of the provision in favour of the tenant in the lease.

The defendant's assertion was, that the grain was his: that he had bought and paid for it with the land, and that he considered he had nothing to do with the claim of the plaintiff, which was against the lessor. But there can be no question when the defendant, then being in the actual possession and ownership of the land by the lessor's own act, refused to allow the plaintiff to take the grain, his right of action against the landlord for breach of the stipulation to allow the plaintiff to harvest the grain, or that he should be paid for it, became complete. It would not lie in the lessor's mouth to say, I did not prevent you, when his conveyance to the defendant gave him the right to claim the grain as his own.

The plaintiff would clearly have been entitled to the crop were it not for the alternative provision in the lease. *Campbell v. Buchanan*, 7 C. P. 179, is an authority to that effect. It is that provision that creates the difficulty, and as it is a rule that the intention of the parties should prevail in the construction of contracts, we have a right to look at the surrounding circumstances, and read by the light derived therefrom the language used. In the present case the reason for the provision determining the lease before the expiration of the term, was the desire of the lessor to sell if he could get an opportunity, and the parties intended to have their respective rights determined in case that event should happen. It was most natural that the landlord should wish to be in a position to give the purchaser an unincumbered title, as that would increase his chance of effecting a sale. It would not be reasonable that the tenant should have the use of the farm, or any part of it, for two years for one year's rent; and it would just be as unreasonable that the tenant who ploughed and sowed in ignorance of the sale, should not be paid for the labour performed by him.

The provision made seems to me ample, interpreted, as I have done it, to prevent an injustice to either party. The plaintiff has clearly a remedy to be paid for his work, but he has sought it in a wrong direction. I am therefore of opinion the defendant's rule should be made absolute.

Rule discharged.

ARMSTRONG V. THE CORPORATION OF THE TOWNSHIP OF
WEST GARAFRAXA.*Municipal corporation—Loan for ordinary expenditure—Resolution of
Council—Liability.*

Defendants, through their treasurer, borrowed from plaintiff certain moneys, giving him two promissory notes therefor, one under seal, the other not. No by-law was passed for the purpose, but the money was borrowed on the authority of a resolution of the council, which was not under seal, and was expended in the repair of certain bridges belonging to defendants. The jury found that the money was borrowed, received and used for ordinary expenditure, and that the repair of bridges was ordinary expenditure :

Held, that plaintiff was entitled to recover.

This was an action tried before Armour, J., and a jury, at the last Fall Assizes, Guelph, and was brought to recover the sum of \$1,700 and interest, money lent by the plaintiff and paid to the treasurer of the township in two sums of \$1,200 and \$500, on the 24th day of September and 18th of October, 1878, upon the authority of a resolution passed by the municipal council of the township on the 21st day September, 1878, in the following words : "That the reeve and treasurer be authorized by this council to borrow such sums of money as will pay such contracts as are finished, until funds are otherwise provided, from any person or bank they may deem best."

In pursuance of this resolution, which was not under seal, William Cassidy, treasurer of the defendants, applied to the plaintiff to lend to the defendants the above sums, giving him two notes therefor ; one for \$1,200, signed by himself and the reeve and under the corporate seal, and the other for \$500, similarly signed, but not under seal.

The declaration contained counts on the notes, and the common counts for money lent, money paid for the defendants at their request, money had and received for the use of the plaintiff, and account stated.

Pleas : *non-fecerunt* and never indebted.

Issue.

At the trial it appeared that during the year 1878 several of the bridges of the township had been carried away by

freshets, and, according to the statement of the reeve when examined under the Administration of Justice Act, his examination being put in evidence by the plaintiff at the trial, there was immediate need of the money to re-build and repair the bridges so carried away. The reeve further stated the contracts for the bridges were let from two to three weeks after the resolution was passed authorizing him and the treasurer to borrow the money. It also appeared that a by-law authorizing the issue of debentures, to the amount of \$2,750, to raise money for building the bridges, was passed, submitted to the ratepayers and approved by them by a vote taken in manner prescribed by the Municipal Corporations Act, the by-law to take effect from the 20th October, 1878: that before the sale of the debentures under the said by-law, about \$2000 had been expended and paid by the corporation, and that by the 15th December about \$3000 of the taxes of the year 1878 had been paid to the treasurer, as the reeve understood from him. The reeve was unable to say of his own knowledge how the moneys borrowed from the plaintiff had been applied, but thought about \$2000 had been expended before the debentures were sold. Some of the moneys had been expended by his orders, and some by other members of the council. A statement of receipts and expenditures by the treasurer, with the auditor's report thereon, was put in. From this it appeared that in the year 1878 more than the sum borrowed from the plaintiff had been expended in building and repairing bridges, but as the items were given without dates, it did not appear whether all or what portion of the payments had been made after the money was borrowed from plaintiff. The treasurer did not, in this statement, charge himself with the money received from the plaintiff, but he did charge himself with the proceeds of the debentures, \$2,443.43, and the balance that he should have had in hand on the 1st January, 1879, was \$10,027.45. The treasurer was a trader within the insolvency laws, and his estate was put into insolvency. When he ceased to be treasurer, his liability to the defen-

dants, including the sums borrowed from plaintiff, was \$7,759.90, on the 21st August, 1879, and the defendants, by affidavit of the reeve, proved against his estate for the amount of the indebtedness.

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit, on the ground that the defendants had no power to borrow money except under the authority of a by-law duly passed: that it did not appear that the reeve ever got the money, and it should have been received both by the reeve and treasurer: that the receipt by the treasurer Cassidy was not a receipt of it by the corporation, and certainly as to the \$500 handed to Mrs. Cassidy, the treasurer's wife, (who it seemed handed the note to plaintiff and received the money) the corporation was not liable: that money expended for the re-building of bridges, destroyed as these bridges had been, was not ordinary expenditure; and, assuming that the corporation could borrow for ordinary expenditure, the power would not extend to a case like the present.

The learned Judge ruled that whether it was ordinary expenditure or not was a question of fact under the circumstances, and not of law, and he left it to the jury, who found that in their opinion money expended in building bridges was ordinary expenditure, and rendered a verdict for the plaintiff for the full amount of his claim and interest, \$1,832.91.

The defendants' counsel objected to this ruling of the learned Judge.

19th November, 1879. *Robertson, Q. C.*, obtained a rule *nisi*, calling on the plaintiff to shew cause why the verdict for him should not be set aside and a nonsuit entered, pursuant to leave reserved at the trial, on the grounds: 1. That the promissory notes sued on were given and made by the reeve and treasurer of the defendants without due authority, and their act in that respect was *ultra vires*. 2. That the money loaned by the plaintiff to the reeve and treasurer of the defendants was loaned by the

plaintiff and borrowed by the reeve and treasurer without due authority given by the defendants authorizing said loans or either of them, and therefore said transactions were and each of them was *ultra vires*. 3. That there was no evidence that the money, or any part of it, was ever received by the defendants, or in any way expended for the use of the defendants. 4. That there was no evidence that the money borrowed was required for ordinary expenditure within the meaning of the Municipal Institutions Act. 5. That there was no ratification of the act of borrowing by the defendants. 6. That the cause of action arose for and concerning a debt incurred and falling due during the year 1878, which was not within the ordinary expenditure of the corporation for the year, and for which no estimate was made and no rate imposed. 7. That the debt was incurred in A.D., 1878, for assisting to build bridges and was not authorized by any by-law, nor any rate provided therefor. 8. That the learned Judge before whom the case was tried, should have charged the jury there was no evidence that the money borrowed was required for ordinary expenditure within the meaning of the Municipal Institutions Act, and should have so held and directed a nonsuit, instead of leaving it to the jury to say whether the said money was so required for ordinary expenditure or not. 9. That the finding of the jury was contrary to law and evidence.

November 26th, 1879. *Bethune* shewed cause, citing *McBrian v. Ottawa*, 40 U. C. R. 80; *Gibson v. Ottawa*, 42 U. C. R. 172; *Payne v. Mayor, &c., of Brecon*, 3 H. & N. 572.

December 1st, 1879. *Robertson*, Q. C., contra, cited *Brice on Ultra Vires*, 2nd ed. 591; *Scott v. Corporation of Peterborough*, 19 U. C. R. 471, per Robinson, C. J.; *Cross v. City of Ottawa*, 23 U. C. R. 292, per Draper, C. J.; *County of Wentworth v. Corporation of the City of Hamilton*, 34 U. C. R. 585.

December 27th, 1879. CAMERON, J.—By sec. 393 of ch. 174, R. S. O., the council of every municipality may authorize its head, with the treasurer thereof, under the seal of the corporation, to borrow from any person or bank such sums as may be required to meet the then current expenditure of the corporation until such time as the taxes levied therefor can be collected, and the council shall by by-law regulate the amounts to be so borrowed and the promissory notes to be given as security therefor.

The provision requires that there should be an authority under the seal of the corporation to the reeve and treasurer to borrow; and, secondly, that the sums borrowed shall be “regulated,” that is, determined, by by-law, which also regulates the promissory note or notes to be given as security therefor.

The resolution in the present instance is not under seal—it does not determine the amount to be borrowed nor the security to be given, and if strict conformity with the requirements of the Act is essential, the plaintiff must fail; but we think, the jury having found that the money was required for ordinary, or, in other words, current expenditure, and that what is or is not current or ordinary expenditure was a question of fact and not of law, the finding of the jury may be well sustained on the ground that the money was obtained for a lawful purpose; that there was evidence to shew that it was used in paying for the reconstruction and repair of bridges damaged by the freshet, and so the defendants got the benefit of the expenditure; and it would be inequitable to allow the defendants to escape a just responsibility by reason of the technical omission to put a seal to the resolution authorizing the reeve and treasurer to borrow the money. Moreover, as to the note for \$1,200, it is under the seal of the corporation; and as under some circumstances a municipal corporation is permitted to give promissory notes, it was incumbent on the defendants to have shewn that this note was not given for a purpose for which the defendants were empowered to give notes. The defendants gave no evidence at the trial,

and the plaintiff's evidence shewed that the money was borrowed for a purpose for which the defendants might legally give a promissory note.

As to the \$500 note there is more doubt, as it is not under the corporate seal; but the money was borrowed for the same purpose, and the verdict may well stand on the common counts. The circumstance of the money having been handed to the treasurer's wife can make no difference in the defendants' liability. The wife produced the note of the reeve and treasurer to the plaintiff, and must be assumed to have been the agent of the treasurer in receiving the money. The circumstance of the defendants having proved against the insolvent estate of their treasurer for a balance made up of different items, including the moneys received from the plaintiff, is a strong one to establish the injustice of the present contention that they are not liable to the plaintiff for the sums borrowed. The objection that the reeve, as well as the treasurer, should have received the money is not entitled to any weight. The treasurer is the legal custodian of the funds of the corporation, and had the money been borrowed with all the formal requisites of the statute observed, it would properly have gone into his hands. The concurrence of the reeve in the treasurer's act is sufficiently manifested by his signing the notes in favour of the plaintiff, and it was not essential that both the treasurer and reeve should have been present at the actual receipt of the money.

HAGARTY, C. J.—From the report of the learned Judge and a perusal of the evidence, it seems established—

1st. That the money obtained from plaintiff was for current expenditure.

2nd. That it was used directly in paying for the work which had to be paid for as such current expenditure. All took place within the year, the lending and the expenditure.

It is difficult to see how the defendants can receive this money for a lawful corporate purpose, expend it on such

purpose, and yet refuse to pay it back. If they unlawfully borrowed it and unlawfully gave notes for its repayment, the only remaining question would be, can they retain a man's money in their hands without any consideration to him in the shape of a legal liability on which he can claim repayment? If as a corporation they actually received into their treasury this plaintiff's money, must they not repay it as a loan, if he be a lender, and they borrowers? Or, if no such relative characters exist, must they not repay it as money had and received by them to plaintiff's use? If they could not legally give him what he was willing to take, their binding obligation to repay it at a named day, must it not be returned to him, they, holding it without value, and for a purpose that has failed? But they say, it is their treasurer that received it individually. As a body they told him and the reeve to borrow it. It was obtained and actually expended—as we think the evidence warrants our finding—in payment of contractors and persons executing work authorized by them by resolution, shewn in their printed proceedings. I think their minutes shew their directions for work to be paid for, and it may be fairly inferred that this very money actually did pay for it.

Then, when the treasurer becomes insolvent, they claim through their reeve to charge him in account, amongst other moneys, with this money received from plaintiff. If the treasurer's estate be insolvent, and they receive dividends, large or small, for these moneys, or the whole amount that he may owe, then will they still deny his right to repayment?

The argument now used in favour of retaining his money will be equally sound when they get back their whole claim from the defaulting treasurer or his sureties.

In both cases they could urge with equal justice that, as they had received the money without certain legal formalities, they are entitled to retain it.

I do not regard this case in the same light as the cases where payment is sought for work and labour done for a

municipal body. This is money given to them to enable them to perform a necessary duty in repairing roads and bridges ; they used it for that purpose, and I cannot see how they can refuse to pay it.

I am most anxious to protect ratepayers against all unlawful dealing with their money by their council, or by any improper action of the council in running them into debt ; but on the facts of this extraordinary case I think we deprive them of no legal safeguard or protection, by declining to sanction the receipt of this plaintiff's money for a lawful necessary purpose and its use for such purpose, and a refusal to repay it.

The money seems to me to be as much received by the corporation as if the plaintiff had brought it to them in the shape of a box of coin, which the council, after passing resolutions therefor, had paid to workmen then engaged in repairing a broken bridge. When they say they had no right to borrow it or to give the owner any valid obligation to repay it, it is then in their hands without value or consideration.

I rest my decision in the plaintiff's favour on the grounds : 1. That through their officer, acting under their resolution, they actually received the plaintiff's money. 2. That it was so received for a lawful purpose, viz., current expenditure. 3. That this very money was promptly paid out by their authority for such expenditure ; and, lastly, that they cannot refuse to repay it, as to hold otherwise would be to enable them to commit a grievous wrong.

ARMOUR, J.—I only desire to add, that at the trial I left it to the jury to say whether the money was borrowed by the defendants to be used by them in their ordinary expenditure within the year 1878, and whether it was so received and used by them. The jury found it was so borrowed received, and used, and I think the evidence adduced simply justified them in so finding. Doubtless the defendants thought the evidence adduced sufficient to shew these

facts, as their counsel had witnesses in Court who could have controverted them had they been controvertible, and their counsel declined to call them, or to address the jury.

I also left it to the jury to say as a matter of fact whether the building of bridges was under the circumstances ordinary expenditure, and they found specially that it was.

I know of no law, and none was cited, compelling me to assist the defendants to defraud the plaintiff, and I do not propose to invent any.

Rule discharged.

SAUVEY V. THE ISOLATED RISK AND FARMERS' FIRE INSURANCE COMPANY.

Insurance—Conditions on face of policy—Title as owner.

In the body of the policy, after stating that it was made subject to the conditions therein contained or thereon endorsed, that is to say, the statutory conditions as varied by the conditions thereunder written, &c., it was added, "In case of loss payment shall be made within sixty days after completion of the proof of loss in accordance with said conditions": *Held*, that this was a condition, and that not being headed in accordance with the statute, it could not vary the 17th statutory condition endorsed, which required payment in thirty days.

A subsequent insurance effected by a mortgagee, under a mortgage containing a covenant to insure according to the Short Forms Act, without the plaintiff's knowledge or consent, was held not to avoid the policy under the 8th statutory condition.

ACTION on a fire policy for \$1,000, claiming a partial loss to the extent of \$409.50.

The only pleas necessary to be noticed are the fourth, fifth, sixth, and seventh.

The fourth plea set up a condition on the policy, that "the company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto by writing,

signed by a duly authorized agent," and averred that there was a subsequent insurance effected on the property in another insurance company called the Royal Insurance Company, and that the defendants did not assent thereto by writing, signed by a duly authorized agent.

The fifth plea set up a condition on the policy, that "the company is not liable for the losses following, that is to say, for loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy," and averred that the property was owned by parties other than the assured, namely, the plaintiff, and that the interest of the assured was not stated in or upon the said policy.

The sixth plea set up a condition on the policy, that "if any person or persons insures his or their buildings or goods, and causes the same to be described otherwise than as they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made;" and averred that the plaintiff omitted to communicate to the defendants that she had an interest in the property insured only during her life or while she remained a widow, which was a circumstance material to be made known to the defendants in order to enable them to judge of the risk they were about to undertake.

The seventh plea averred that it was agreed by and between the plaintiff and the defendants by the said policy, and as a part and parcel thereof, that in case of loss payment should be made within sixty days after the completion of the proofs of loss, in accordance with the conditions endorsed on the policy, and that sixty days had not elapsed after the completion of the proofs of loss in accordance with the conditions endorsed on the said policy before the issue of the writ herein.

Issue.

The cause was tried before Wilson, C. J. C. P., and a jury, at the last Fall Assizes, at Peterborough.

The policy declared on was put in, and upon its face there was this provision: "In the event of loss under this policy, the amount the insured may be entitled to receive shall be payable to J. J. Lundy," and also upon its face was this provision: "This policy is made and accepted in reference to the conditions herein contained and hereon endorsed, that is to say, the statutory conditions as varied by the conditions thereunder written, which are hereby declared to be part of this contract, and to be used and resorted to in order to define and explain the rights and obligations of the parties hereto in all cases not herein or otherwise specially provided for." And also upon its face was this provision: "In case of loss payment shall be made within sixty days after the completion of the proofs of loss in accordance with the said conditions."

There were endorsed on the policy the conditions set up in the fourth, fifth, and sixth pleas respectively, and also the seventeenth statutory condition, in these words: "The loss shall not be payable until thirty days after completion of the proofs of loss, unless otherwise provided by statute or the agreement of the parties."

The deed under which the plaintiff held the property insured, and the land on which it stood, was put in, dated July 20, 1871, between Octave Beauvais, the father of the plaintiff, of the first part, Ellen Beauvais, his wife, (for the purpose of barring her dower,) of the second part, and the plaintiff, the wife of Henry Sauvey, of the third part, whereby the party thereto of the first part conveyed the said property to the plaintiff, to have and to hold unto and to her use during the term of her natural life, and after her death to be and become the sole and only property of such of the issue of the said Henry Sauvey and the plaintiff as should then be living, in fee simple absolutely, with a proviso, therein contained, that, in the event of the death of Henry Sauvey during the lifetime of his wife, the plaintiff should only be entitled thereto, or to any interest

therein, so long as she should remain his widow, and in the event of her marriage thereafter, she should cease to be the owner thereof, or to be entitled to any interest therein, and the same should thereupon be and become the sole and only property of such of the issue of the said Henry Sauvey and the plaintiff as should then be living, in fee simple absolutely.

It also appeared that J. J. Lundy held a mortgage from the plaintiff upon the property for \$250, made in pursuance of the Act respecting Short Forms of Mortgages, and containing the stipulation as to insurance in schedule B to that Act, numbered 12 (this was why the loss was made payable to him); and not knowing that the plaintiff had effected this policy, and without the knowledge or consent of the plaintiff, he effected another and subsequent insurance in the plaintiff's name in the Royal. It was proved that after the loss sued for, and before action, Lundy assigned any money payable in respect of such loss to the plaintiff, and that nothing had been received from the Royal in respect of such loss.

Completion of the proofs of loss was made on April 24th, and this action was commenced on the 19th of June, 1879. The application for this insurance was put in, upon which it appeared that the answer to the requisition, "State fully the applicant's interest in the property, whether owner, mortgagee, or lessee, &c.," was "Owner;" and that the answer to the requirement, "If encumbered, state to what amount," was, "Mortgaged to John J. Lundy."

At the close of the evidence counsel for the defendants contended, as to the seventh plea, that proofs of loss were sworn to by the applicant on the 22nd of April, 1879, and were mailed by the plaintiff's attorney at Peterborough on the 22nd of April, 1879, and were received by the defendants at Toronto, the place of the head office, on the 24th of April, and action brought on the 19th of June, 1879, and within sixty days: that, as to the fourth plea, there was in fact a subsequent insurance not assented to by the defen-

dants, *i. e.*, Lundy insured in the Royal ; and that, as to the fifth and sixth pleas, relating to the plaintiff's interest, the deed to the plaintiff shewed she had only a life interest, and alleging she was owner shewed she did not state fully her interest, and she did not communicate she had only a life interest. He admitted that if the plaintiff was entitled to a verdict, it was for \$409.50 and interest from sixty days from the 24th of April, 1879, or thirty days if the other construction should prevail.

It was contended on the other side, as to the seventh plea, that by the seventeenth statutory condition the loss was not payable till after thirty days after completion of proofs of loss, unless otherwise provided by statute or agreement of the parties : that the seventeenth condition was varied by providing that proofs of loss should be furnished within sixty days, or if not done, the policy should be void : that it did not say that no action should be brought till after the expiration of the sixty days.

Counsel for the defendants stated that he did not rely on the variation, but on the face of the policy : that in case of loss, payment should be made within sixty days after completion of the proofs of loss.

Counsel for the plaintiff said that what was on the face of the policy was in fact a variation of the seventeenth condition, and the variation endorsed did not refer to the time of suing : that, as to the fourth plea, the interim receipt put in did not shew an insurance on the property : that the plaintiff's proofs of loss did not shew there was any second insurance, but only that she had heard so : that if a second insurance, it was made by the mortgagee without the plaintiff's consent or knowledge : that the statute provided that a mortgagor under the insurance condition should insure, but did not enable a mortgagee to insure in the mortgagor's name, as Lundy did here, and so there was no second insurance to affect the plaintiff : that, as to the fifth and sixth pleas, the fifth plea related to the tenth condition : that the plaintiff was owner for life, and remaindermen were not other persons who owned the property

with the insured: that, as to the sixth plea, it was not shewn that it was material to the risk to state that the plaintiff was tenant only for life.

The learned Chief Justice thereupon ruled as follows:—

“I say as to the fourth plea, I hold there was no subsequent insurance. Mr. Lundy had no power to insure in plaintiff's name without her consent, which he had not obtained.

“As to the fifth plea. The condition is, that the company are not liable for loss of property ‘owned by any other party than the insured, unless the interest of the assured is stated in or upon the policy.’ I am not satisfied that property in remainder can be said to be owned by the remainderman with the tenant for life; and where the plea alleges that the property was owned by parties other than the assured, it really means the plaintiff did not own the property at all. The subsequent words in the plea, and that the interest of the assured was not stated in or on the policy, may mean an interest different from the ownership, such as that of an equitable mortgage. Now, she was an owner, and, as I think, rightly described as owner, though it would have been more precise to have said owner for life, and she was interested in it as owner.”

As to the sixth plea. The estate being for life instead of in fee is not shewn to have been a matter material to the insurance, and I don't think it was, at any rate on a policy for one year.

“As to the seventh plea. I think it is of very little difference where the time of payment is mentioned, whether in the policy or on it: it is only a condition wherever it is. In fact the policy here on its face, and the seventeenth condition endorsed, differ, unless the words, ‘unless the parties otherwise agree,’ prevent such difference. I incline to think the variation should shew the difference as to the time of payment.”

A verdict was thereupon rendered for the plaintiff for \$417.

November 17th, 1879. *J. K. Kerr*, Q. C., obtained a rule *nisi* calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to the statute, or a new trial granted, on the ground that the verdict was contrary to law and evidence; and on the ground that it was established at the trial that the plaintiff was not the owner of the property insured, but was only entitled to a life interest therein, subject to be determined during her life; and on the ground that a further insurance was effected upon the property insured without the assent of the defendants, and the defendants were not therefore liable for any loss in respect of the property insured; and on the ground that the loss was not payable at the time of the commencement of the action.

November 27th, 1879. *E. B. Edwards* shewed cause. There is no charge in this case of fraud, false swearing, or over-valuation. The defence is purely technical, and without merits to entitle the defendants to the consideration of the Court. The first ground taken by the rule, that the plaintiff is not the owner of the property, rests upon the fifth and sixth pleas, which are based on the tenth and first statutory conditions respectively, and defendants must be confined to those pleas. Under the fifth plea they must shew that this is "property owned by parties other than the assured," in the words of the plea and the statutory condition. Under the sixth plea they must shew not merely that the plaintiff had only a life interest in the property, but that this was "a circumstance material to be made known to the company to enable it to judge of the risk it undertakes," as set out in the plea. There was not a word of evidence at the trial that this circumstance, if established, was material, and the Judge expressly found that it was not material. Nor was it shewn under the fifth plea that the property in question was owned by parties other than the assured. The plaintiff is the owner, whether it be held that she is tenant for life or tenant in tail. The *habendum* in the deed under which she holds is peculiar, but the estate created is an estate in tail special. The

word "owner" has no technical meaning in law. See *Hopkins v. Provincial Ins. Co.*, 18 C. P. 74; *Brogan v. Manufacturer and Merchants Montreal Fire Ins. Co.*, 29 C. P. 414; *O'Neill v. Ottawa Agricultural Ins. Co.*, 30 C. P. 151. The form of the application requires the applicant to state title, "whether owner, mortgagee, or lessee." As to the objection that the policy is void on the ground of there being a subsequent insurance, the Chief Justice at the trial found that Lundy had no power to insure in plaintiff's name without her consent, which he had not obtained. Besides, there was no legal evidence whatever that there was any subsequent insurance on the same property. The interim receipt held by the mortgagee does not specify the property except by reference to the application, which was not put in, and oral evidence as to its covering the same property was objected to at the trial and ruled out by the Judge. See *Park v. Phœnix Ins. Co.*, 19 U. C. R. 110; *Dafoe v. Johnstown District Ins. Co.*, 7 C. P. 55; *Gilchrist v. Gore District Ins. Co.*, 34 U. C. R. 15. The insurance clause in the mortgage does not give the mortgagee power to effect an insurance in the mortgagor's name. R. S. Ont. ch. 104. The variation of the statutory condition was not pleaded, and cannot now be relied on. The time for payment of the loss is a condition, and the Legislature have so treated it. The seventeenth statutory condition provide: for payment in thirty days. No different time is fixed by the variations of the conditions. The variation cannot be embodied in the policy itself. There is no agreement of the plaintiff to any other time for payment. Under the second statutory condition she is entitled to a policy in accordance with the application, unless the difference is pointed out in writing. The application contains no mention of time for payment, and therefore calls for a policy with the statutory time for payment according to the seventeenth condition, or a proper variation thereof in the manner pointed out by the statute. The last statutory condition requires the action to be brought in a year from date of loss. If the company could vary the

time for payment otherwise than by a proper variation of the condition, upon the reasonableness of which the Court should have an opportunity to pronounce, then they might put in the body of their policy that the loss should only be payable in a year and sixty days after the loss, just as well as by naming sixty days. The effect would be wholly to defeat the claim. Whatever time be fixed, the Court must have an opportunity of judging of its reasonableness, regard being had to the last statutory condition limiting the time for suing to a year from date of loss. There is no agreement by plaintiff to vary the time for payment mentioned in the seventeenth condition. It would need to be a distinct positive agreement. The defendants choosing to put it in the body of their policy without calling her attention to it in writing, as provided by the second condition, does not make it an "agreement" on the part of a woman who can neither read nor speak English. He also referred to *Frey v. Wellington, &c., Ins. Co.*, 43 U. C. R. 102; *Ulrich v. National Ins. Co.*, 42 U. C. R. 141, 163; S. C. 4 App. R. 84; *Parsons v. Citizens' Ins. Co.*, 43 U. C. R. 261.

J. K. Kerr, Q. C., contra, referred to *Gilchrist v. Gore District Mutual Ins. Co.*, 34 U. C. R. 15; *Mechanics' Building and Savings Society v. Gore District Mutual Ins. Co.*, 3 App. R. 151.

December 27th, 1879. ARMOUR, J.—The verdict for the plaintiff on the fourth plea must stand.

The subsequent insurance aimed at by the condition set up in that plea is a subsequent insurance by the insured.

In this case the subsequent insurance effected by Lundy in the Royal could not, although in the plaintiff's name, be said to be a subsequent insurance by the plaintiff, because it was effected without any authority from the plaintiff, and without her knowledge, subsequent adoption, or ratification: See *Park v. Phoenix Ins. Co.*, 19 U. C. R. 110; *Gilchrist v. Gore District Mutual Ins. Co.*, 34 U. C. R. 15.

The issue upon the fifth plea was rightly found for the plaintiff.

The condition set up in that plea was imported from usual conditions of policies of insurance upon goods, and in the conglomerate statutory conditions is made to do duty for policies upon buildings as well as upon goods, and in policies upon goods it referred to cases where the party insured had an insurable interest, as a bailee, &c., the property in the goods being in another.

Applying this condition, however, as it is made applicable in this case to the building in question, was this building owned by any other party than the assured? I think not within the meaning of the condition.

Whether the plaintiff was tenant for life or in tail makes very little difference; she was the owner all the same, and properly described herself as such: See *Hopkins v. Provincial Ins. Co.*, 18 C. P. 74; *Brogan v. Manufacturers' Ins. Co.*, 29 C. P. 414; *Wood on Insurance*, 71.

She was owner by virtue of her then present estate in the land, and no other party had any present estate in the land nor was interested in her estate, except, of course, the mortgagee; and the application being made part of the policy, the interests of the plaintiff as mortgagor and of Lundy as mortgagee are stated in the policy.

The defendants failed to establish the sixth plea.

In my opinion the condition therein set up has no reference to title at all: see *Samo v. Gore District Mutual Ins. Co.*, 1 App. R. 568; but it is unnecessary to determine this, for the defendants did not shew by any evidence that the particular nature of the plaintiff's title was a circumstance material to be made known to them in order to enable them to judge of the risk they undertook.

I think, also, this action was not prematurely brought.

The stipulation upon the face of the policy, "In the event of loss, payment shall be made within sixty days after completion of the proofs of loss, in accordance with said conditions," is a condition, and, as such, a variation of the statutory condition number seventeen, and not being indicated and set forth in the manner prescribed by the Act R. S. O. ch. 162, sec. 485, is not legal and binding on the plaintiff.

The statutory condition, number seventeen, is: "The loss shall not be payable until thirty days after the completion of the proofs of loss, unless otherwise provided by statute, or the agreement of the parties;" and it was argued by Mr. *Kerr*, with his usual ingenuity, that this policy having been issued by the defendants, and accepted by the plaintiff, and containing on its face the stipulation above mentioned, constituted an agreement of the parties (that is, of both parties,) within the terms of the seventeenth statutory condition.

The policy sued upon, containing the stipulation relied upon, issued, and accepted as above stated, is not an agreement of the parties to that stipulation; the agreement of the parties referred to in the statutory condition is clearly an agreement outside of the policy. The defendants might just as well have made that stipulation sixty years as sixty days, and contended that such a stipulation was the agreement of the parties. It is a condition, not an agreement, and is sought to be imposed upon the insured in direct contravention of the law.

I think the ruling of the learned Chief Justice was right, and that the rule should be discharged.

HAGARTY, C. J.—On the argument the chief difficulty I felt was, as to the sixty days and thirty days question. I was under the impression that it was in the contracting part, or, as it were, in the promise to pay itself, that it was made performable sixty days after proof, &c.

I find it is not so. After the formal statement of a complete contract of indemnity against loss by fire on certain named property, for a named premium, and up to a certain sum assured, then begin what I think we must hold to come under the head of conditions qualifying the previous absolute contract: "And it is hereby agreed and declared to be the true intent and meaning of the parties hereto," &c., stating certain things that may avoid the policy, such as the exercise of hazardous trade, or storing hazardous goods &c.

Then follow these words: "This policy is made and accepted in reference to the conditions herein contained, or hereon endorsed, that is to say, the statutory conditions as varied by the conditions thereunder written, which are hereby declared to be part of this contract, and to be used and resorted to in order to define and explain the rights, &c., of the parties, in all cases not herein or otherwise specially provided for. In case of loss, payment shall be made within sixty days after completion of the proofs of loss in accordance with said conditions."

We first have an absolute unqualified contract of indemnity, performable as soon as the event of loss occurred. Then come conditions certainly qualifying the absolute contract. Then a declaration that the statutory conditions, as varied by the conditions thereunder written, are to define and explain the rights of the parties. Then a clause giving sixty days for the payment after completion of proofs, also qualifying the absolute contract.

I think we must hold these to be conditions.

In the statutory condition number seventeen, "the loss shall not be payable until thirty days after completion of the proofs of loss, unless otherwise provided by statute or the agreement of parties."

Then, under "Variations" in conditions, to the seventeenth statutory condition the following is added, "and unless the said proofs of loss be completed and furnished to the company within sixty days from the happening of the loss, all liability of the company shall cease, and all claims under the policy shall become void."

This "variation," instead of varying the thirty days, number seventeen clause, as to time, confirms it, and requires it to be read with an addition on another point.

The case then stands thus: We think the passages cited from the face of the policy must be held to be in the nature of conditions, and, as they are not headed either as statutory or variations, they cannot be resorted to.

The statute seems clear in its directions. It can be most readily evaded if all or any conditions or agreements or

declaration qualifying or restricting the contract of indemnity may be placed on the front page or body of the policy, preceding the corporate seal and signatures, without any heading called for by the statute.

A different question might be presented if the promise to pay was, "We will pay so much sixty days after loss, &c., &c."

But the singular part of this case is, that when they come to qualify the statutory conditions by variations, they confirm and repeat the thirty days' clause. It would be there a person would naturally look for any qualification of the payment in thirty days.

Had the loss occurred while an interim receipt was running, all the assured could expect, or, as I think, the assurers could offer, would be a policy with the statutory conditions; or, at all events, not varying or postponing the time of payment beyond the thirty days, unless a different agreement were shewn by such interim receipt. See *Parsons v. Queen's Ins. Co.*, 4 App. R. 111, *per* Moss, C. J. A.

As to the answer to the question of title of the assured, I concur that the defence fails. The defendants made no attempt to shew any misleading by the statement that she was the owner, nor that anything material was withheld or concealed.

In common parlance, most persons holding an estate for life, remainder to their children, although defeasible on two remote contingencies, and then only in favour of such children, would speak of themselves as "owners."

I think the cases referred to in our own Courts, and those cited therein, will sustain this view.

CAMERON, J., took no part in the judgment, being interested as a stockholder in the company.

Rule discharged.

BRIDGMAN V. THE LONDON LIFE ASSURANCE COMPANY.

Insurance—Misrepresentation—"Brother"—Construction.

On an application for life insurance deceased, in answer to a question as to how many brothers he had had, answered "three, two living," whereas it appeared that he had had also four half brothers, of whom one only was living.

It was left to the jury to say whether the applicant in this answer was guilty of an untruth, and whether the statement was material: *Held*, that it was properly so left, and a verdict for the plaintiff was sustained. *Quære*, as to the proper meaning of the word "brother."

ACTION on a policy of insurance on the life of one Irwin Bridgman, husband of plaintiff, for \$1,000.

6th plea. That in deceased's application he untruthfully declared that the number of brothers whom he had had was three, of whom two were living, whereas he had had seven brothers, of whom four had died.

9th plea. That he had declared there was no material fact relating to his family history or habits which had not been stated, yet a material fact known to the applicant relating thereto was not stated, viz., that he had had four brothers who had died.

Issue.

The trial was at Toronto, before Burton, J. A.

In the application there was a question, "How many brothers have you had?" Answer: "Three, two living." State of health? "Good; one died in infancy." Provision was made for forfeiture of the policy if any untrue averment, or misrepresentation, or evasion, was made.

Question 17 was as to any material fact relating to the family history, to which he merely made a statement as to his mother.

He also declared, in a note at the foot of the application, that he was aware that any misstatement or concealment of any material fact would invalidate the policy.

It was shewn that he had had four half brothers, one of whom only was living, and was examined at the trial.

It also appeared in evidence that he had on two previous occasions made applications to other Courts in which, in answer to similar questions, he mentioned that he had had four half brothers, three of whom had died.

Nothing was proved as to any special reason for enquiry or information as to the health of any of these half brothers. They were all by the same father, but by different mothers.

It was objected that deceased's answer was untrue as to his brothers, and also that he did not disclose the material fact as to these brothers, and as to those who had died.

The charge of the learned Judge was as follows:—
“This case has resolved itself into two very simple questions. Insurance companies have a right, if they think proper, to make it a condition of their contract with an insured, that if any statement made in answer to any question submitted to the latter be untrue the policy is thereby vitiated, whether the untrue statement is made designedly or by accident; and if a party chooses to make such a contract with a company with which he insures, he must be bound by it. But while parties have a right to make a contract of that kind, Courts will always construe such a warrant very rigidly against the company which prepared it, and, if there is any ambiguity about it, will construe it in favour of the party making the insurance. I should be inclined to think, as a matter of legal construction, that the word ‘brothers’ here had the meaning which we usually assign to it, that of brothers of the whole blood. But it is contended here that that was not the view taken by the party who was applying for this insurance, and evidence, which for the present I hold to be good, and on which I am going to take your opinion, has been given, that he himself on another occasion understood that word ‘brothers’ to include the brothers of the half blood; and it is also in evidence that in addition to his own brothers he had four brothers of the half blood, to whom in one or two previous applications he referred as his brothers. If you come to the conclusion that in answering the question,

‘How many brothers have you had?’ the applicant was guilty of an untruth, I suppose you will have to find a verdict for the defendants. But if you can say upon this evidence that the statement which he made in answer to that question was not an untruth, then, so far as that issue is concerned, you will find for the plaintiff. In the former case, however, you would also find for the plaintiff, if you were of opinion that what was not stated was not material.”

The jury found for the plaintiff.

November 21st, 1879. *Falconbridge* obtained a rule *nisi* for a new trial on the law and evidence, weight of evidence, and for misdirection and want of proper direction in telling the jury that they must construe a warranty of this nature most strongly against the defendants, and if there was any ambiguity to construe it in favour of assured; and in telling the jury he would construe ‘brothers’ as the brothers of the whole blood, and in leaving to them the construction of the question.

Dec. 2nd, 1878. *Rose* and *G. T. Blackstock* shewed cause, contending that the warranty was qualified in its character, being expressed to be to the best of his knowledge and belief, and that there was no evidence deceased knew his answer to be untrue. They referred to *Leake v. Robinson*, 2 Mer. 382; *Leith’s Blackstone*, 147; *Roper* on Legacies, 128.

Falconbridge, contra. There is a misrepresentation of a material fact. If the Judge was wrong, the verdict cannot stand: *Fitton v. Accidental Death Ins. Co.*, 17 C. B. N. S. 122; *Anderson v. Fitzgerald*, 4 H. L. Ca. 484; *Jarman* on Wills, ii., 140. The construction of the question and answer is for the Court: *Moore v. Connecticut*, 3 App. R. 257.

December 27th, 1879. HAGARTY, C. J.—The point on which the defence was finally rested before us, was on the question and answer as to plaintiff’s brothers.

I do not see how the learned Judge could have taken the

question and answer wholly into his own hands, and directed the jury to find one way or the other as a purely legal consequence.

He expressed an opinion that as a matter of mere legal construction he inclined to think 'brothers' meant brothers of the whole blood.

It is not easy, in my opinion, to give a very clear *legal* definition of the word "Brother."

I have not found a strict legal definition of the word as such.

Mr. *Jarman* says, vol. ii., 140, ed. 1861: "A gift to brothers and sisters extends to half brothers and sisters." He cites *Leake v. Robinson*, 2 Mer. 363; but there the point, though adverted to, is not necessarily decided.

In *Grieves v. Rawley*, 10 Hare, 63, before Turner, V. C., Sir W. P. Wood, in arguing, quotes Johnson's Dictionary defining a brother as one born of the same mother and father.

The Vice-Chancellor says: "It is true the dictionaries so describe the relation of brother and sister." He adds, "I think that, in general, when a man speaks of his brothers and sisters, he speaks of them, not with reference to the definition of the word in the dictionary, but as a class standing in the same relationship to one or both of his parents as he himself stands in. Though not descended from the same parents the parties are, as is said in the *Termes de la Ley*, after a sort brothers, 'brothers by the father's side,' 'brothers by one mother;' and, however other parties may describe them, or they designate themselves, if required to give a precise description of the nature and degree of the relation subsisting between them, I think that, in ordinary parlance, they would be called, and would call themselves, brothers and sisters."

He puts a case of a family of sons and daughters of the father by different marriages, and A. was asked the question as to the relation between him and B., another member of the same family, "Would not the question be, 'Is B. your whole brother or sister, or your half brother or sister, and

would not the answer be in similar terms?' Both the party questioning and the party questioned would thus call B. a brother or a sister, *but each would distinguish the character and degree of their relation.*"

Lexicographers certainly favour the idea that "Brother" means the offspring of the same parents.

Richardson says: "Brothers, or brethren, are children bred from the same parent," quoting Skinner: "I believe that brother, the Dutch Broeder, the German Bruder, are all derived from the verb to breed, *simul fatus, i. e., educatus*,—of the same brood."

Again under "Sister:" "females by the same parents are sisters. Males and females so related are brothers and sisters." See also Imperial and other dictionaries.

"*Frater Consanguineus*, a brother by the father's side. *Frater uterinus*, by the mother's side. *Frater nutricius*, sometimes used for a bastard brother." Tomlins's Law Dictionary.

After all it seems that the question for the jury would be, as to how the question and answer would be reasonably and naturally understood. I understand the finding of the jury involved that what was withheld was not material.

I am not disposed to find fault with such a conclusion. There is nothing to suggest bad faith or desire to conceal anything, or any reason for concealment.

This would reduce it to the question whether in fact the answer is untrue, these questions and answers being the agreed basis of the contract, and the company being entitled to full information.

It was urged that deceased must have been aware that "Brothers" included half brothers. His statement to another company some years before was referred to, in which he is said to have answered the same question by including the half blood brothers.

On this it may be remarked that he may have been afterwards told that "Brothers" only meant of the whole blood, or that when he made the former answers he may have been more pointedly interrogated, and his answers filled in by another hand for him.

If the jury found that deceased truly answered the question as he reasonably understood it, and as it might be reasonably understood, and that no material fact was kept back, we ought not be too astute to defeat a just claim.

If the facts withheld or not stated were material, then its withholding cannot be excused merely on the ground that the respondent did not think it was material. Sir George Jessel, M. R., in a recent case, *London Ass. Co., v. Mansell*, L. R. 11 Chy. Div. 367, reviews the authorities as to the giving or withholding information of material facts.

He quotes approvingly by Lord Cranworth's language: "A party is required not only to state all matters within his knowledge which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceal anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy." Again the M. R. cites Baron Parke: "Those instruments are made upon an implied contract between the parties that everything material known to the insured should be disclosed by them." Again, he cites Mr. Justice Bayley: "Whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to shew that the party neglecting to give the information thought it material."

The M. R., after noticing these and other authorities, says, at p. 370: "If a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment, properly so-called, means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact, if it was a material fact."

As a strong illustration of the view that respondent's construction of the question was not very unreasonable, I may mention that one of my learned brothers thinks he would have taken the same view, and given the same answer. My other brother and I think we would have mentioned our half brothers, if we had any.

I think the verdict for plaintiff may stand.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

MADDEN v. COX ET AL.

Bill drawn on president of R. W. Co.—Acceptance—Personal liability.

The charter of the Midland R. W. Co., 16 Vic. ch. 241, sec. 5, gives them power to become parties to bills and notes, and enacts that any bill accepted by the president, with the countersignature of the secretary, or any two of the directors, and under the authority of a majority of a quorum of the directors, shall be binding on the company, and every bill accepted by the president as such, with such countersignature, shall be presumed to have been properly accepted for the company, until the contrary be shewn: that the seal shall be unnecessary, nor shall the president, &c., so accepting any bill, be individually liable.

A bill of exchange addressed, "To the President, Midland Railway," was accepted in these words, "For the Midland Railway of Canada, accepted, H. READ, Secretary; GEO. A. COX, President": *Held*, CAMERON, J., dissenting, that defendant Cox, (who was admitted to be the president,) was personally liable, the bill not being drawn upon the company.

Action by holder against defendant Hurdon, as drawer, and defendant Cox, as acceptor, of the following bill of exchange:—

"MIDLAND, December 9, 1878.

One month after date, for value received, pay to the order of myself \$631.80, payable at the Bank of Montreal in Port Hope, and charge to account of

(Signed) F. HURDON."

"To the President

Midland Railway, Port Hope."

Across the bill was written:

“For the Midland Railway of Canada. Accepted.

H. READ, *Secretary*.

GEO. A. COX, *President*.”

Plea, by defendant Cox, denying the acceptance as alleged.

Issue.

It was shewn, at the trial at Walkerton, before Galt, J., that the consideration for the bill was supplies to the Midland Railway Company, that defendant Cox was president, and Read secretary, and that the Company usually accepted bills in that form.

Reference was made to a clause in the original charter of the company (said to be 16 Vic. ch. 241) sec. 5, (a) allowing the company to become parties to notes and bills, and providing that any bill drawn, accepted, or endorsed by the president of the company, with the counter-signature of the secretary, or any two of the directors, and under the authority of a majority of a quorum of the directors, should be binding on the company, and that every note or bill made, drawn, accepted or endorsed by the president of the said company, or any two of the directors as such, with the counter-signature of the secretary, should be presumed to be properly made, accepted, &c., for the company until the contrary was shewn: that the seal should in no case require to be affixed, and the president, directors, or secretary so making, accepting, &c., should not be individually liable.

A verdict was entered for the plaintiff against both defendants, with leave reserved to the defendant Cox to move to enter it for him.

November 17, 1879. *J. K. Kerr*, Q. C., obtained a rule *nisi* accordingly.

(a) The 16 Vic. ch. 241, amends the 9th Vic. ch. 109, by which the Peterborough and Port Hope R. W. Co. was incorporated. By 18 Vic. ch. 36, the name of the company was changed to the Port Hope, Lindsay, and Beaverton R. W. Co., and by 33 Vic. ch. 31, it was changed to “The Midland Railway of Canada.”

November 27, 1879. *C. Robinson*, Q. C., shewed cause. This is a bill of exchange, not a promissory note, and it is not drawn on the company; and the charter, therefore, has no application. In *Herald v. Connah*, 34 L. T. Rep. 886, Bramwell, B., is reported to have said that the right way for an acceptor to notify that he is accepting for another to notify that he is so accepting, is for him to use such words as "accepted for," or "per proc." But in *Mare v. Charles*, 5 E. & B. 978, the words were "accepted for the company," and defendant was held personally liable. Unless the charter exempts the defendant the cases shew clearly that he is liable. He referred to *Chalmers on Bills of Exchange*, 32, 33, 40, 61; *Bateman v. Midwales R. W. Co.*, L. R. 1 C. P. 499; *Brice on Ultra Vires*, 637, 640; *Ex parte Overend, Gurney & Co.*, L. R. 4 Chy. 460; *Herald v. Connah*, 34 L. T. N. S. 885; *Laing v. Taylor*, 26 C. P. 416; *Balfour v. Ernest*, 5 C. B. N. S. 601.

Kerr, Q. C., contra, referred to *Hagarty v. Squier*, 42 U. C. R. 168, 169; *Robertson v. Glass*, 20 C. P. 250; *Walker v. Harrop*, 6 H. & N. 768; *Good v. Houghton*, L. R. 2 Ex. D. 357; *Deslandes v. Gregory*, 2 E. & E. 602; *City Bank v. Cheney*, 15 U. C. R. 400; *Neale v. Turton*, 4 Bing. 149; *Davis v. Clarke*, 6 Q. B. 16.

December 27, 1879. HAGARTY, C. J.—The whole difficulty that I feel in defendant's argument is, that in my judgment the bill is not drawn on the Railway Company. If this can be surmounted, there need be little difficulty. I regard the bill as addressed to the individual filling the position of president. It would be just the same if this address were "To George A. Cox, president Midland Railway," instead of as it is here.

In *Chalmers's Digest*, p. 29, acceptance is defined to be "the assent in due form by the drawee of a bill of exchange to the order of the drawer."

To put the case very strongly for the defendant: suppose the draft had been, "Accepted, the Midland Railway of Canada," and either the corporate seal attached or the

names of the president and secretary, as verifying the acceptance. If the company were sued as acceptors, the question might remain that the acceptance was of a bill not addressed to the company; or if the company, being bound to accept, refused to accept, and were sued therefor. It is not necessary to decide how this would be, but I mention it as illustrating the difficulty as to the party on whom the bill professes to be drawn.

As Kelly, C. B., says, in *Okell v. Charles*, 34 L. T. N. S. 824: "A promissory note is a totally different thing from an acceptance of a bill of exchange, which incorporates in the acceptance the person on whom it is drawn."

I also refer to Sir George Jessel's language in the same case, where the draft was expressly drawn on the company: "If the acceptances had stood alone they might possibly not have been enough to bind the company, *but coupled with the fact that the company is the drawee*, it is perfectly clear that they come within the Act, and that the directors are not personally liable." *Herald v. Connah*, in same vol. p. 885, may be referred to. I need not go again over the grounds of decision in *Laing v. Taylor*, 26 C. P. 416. I think that case was rightly decided.

I hold that this bill of exchange is not drawn on the Midland Railway Company, and that it is drawn on a person filling the character of president, that the defendant does in fact answer that character, and admits in writing that it is drawn on him, and that he is personally bound. I have a strong opinion that we cannot be too careful in unsettling the understood requirements of negotiable instruments. The rule seems to me to be plain, that a bill of exchange must have a drawee, and that except such drawee, or some person for the honour of the drawer, no other person can accept. I cannot hold that addressing a bill to a president or secretary of a chartered company is the same as addressing it to the company itself. If the drawer mean the company, he can say so.

If he had even said, "To George A. Cox, President—for

the Midland Railway Company," it would be a step nearer to shewing his meaning.

I think the interests of public business require our adhesion to plain, intelligible rules of construction in all matters relating to bills and notes.

ARMOUR, J.—The difficulty under which the defence labours is, that the bill sued on is neither addressed to, nor accepted by, the Midland Railway of Canada.

It is either a bill addressed to, and accepted by, the defendant, or it is waste paper.

A bill addressed to the president of this corporation can no more be said to be addressed to the corporation than if it were addressed to the secretary, treasurer, solicitor, engineer, or the station master at any named place, of the corporation.

This bill must, in my judgment, be looked upon as addressed to George A. Cox, president, &c.,—to the individual, and not to the corporation.

The Act, 16 Vic. ch. 241, applicable to the corporation referred to, provides, by section 5, "That the said company have, and shall have, power to become parties to promissory notes and bills of exchange; and any promissory note made or endorsed, and any bill of exchange drawn, accepted, or endorsed by the president of the company, with the counter signature of the secretary of the company, or any two of the directors of the company, *and under the authority of a majority of a quorum of the directors*, is, and shall be binding upon the company; and every promissory note or bill of exchange made, drawn, accepted, or endorsed, by the president of the said company, or any two of the directors as such, with the counter signature of the secretary, shall be presumed to have been *properly* made, drawn, accepted, or endorsed, as the case may be, for the company, *until the contrary be shewn*."

The presumption that this bill was properly accepted was overthrown at the trial, for the contrary was shewn. It was shewn that this bill was not accepted under the

authority of a majority of a quorum of the directors, and so it never was accepted by the corporation.

It is idle to guess what may be the merits of the defence. But having regard to the law, known to every body, that the moment supplies are furnished to the corporation referred to, that moment they become subject to the lien of the bondholders, (see 34 Vic., O., ch. 51, sec. 1; 36 Vic., O., ch. 90, sec. 2.) it is just as reasonable to suppose that the person who furnished the supplies to the corporation, for which he drew this bill, furnished them upon the personal credit of the defendant, its president, as that he did so upon the so-called credit of the corporation.

In my opinion the principles established by decided cases determine the defendant to be liable on the bill sued upon: *Slawson v. Loring*, 5 Allen, 341.

CAMERON, J.—The defendant Cox disputed his liability, on the ground that the bill was not accepted by him in his individual capacity, but simply as the president of and for the company. I think this contention is well founded, and the plaintiffs should have been nonsuited, or a verdict entered for the defendant Cox. I have arrived at this conclusion from the following considerations: The bill is not addressed to him by name, and extraneous evidence had to be admitted to shew that he filled the office of president. When parol testimony was admitted to establish that, it was open to him to shew that it was in that character, and not personally, or as his individual act, he signed the bill. Moreover, on the face of the bill the acceptance does not purport to be his, but that of the Midland Railway Company by the officers who, by the company's charter, were authorized to bind the company by their signatures to promissory notes and bills of exchange.

No clearer indication that the defendant Cox did not intend to make himself personally liable could be given than the words used in the acceptance, "For the Midland Railway of Canada, Accepted, H. Read, Secretary, Geo. A. Cox, President."

Let it be conceded that no person or corporation can be liable as the acceptor of a bill of exchange, except for honour of the drawer, unless the bill is addressed to such person or corporation; the plaintiff's difficulty here is, making out as matter of law, against the true fact, that this bill was addressed, as stated in the declaration, to George A. Cox, and not to the Midland Railway Company.

By section 5 of 16 Vic. ch. 241, it is declared "the said company have and shall have power to become parties to promissory notes and bills of exchange; and any * * bill of exchange drawn, accepted or endorsed by the president of the company, with the counter-signature of the secretary of the company, * * is, and shall be binding upon the company; and every * * bill of exchange made, drawn, accepted or endorsed by the president of the said company, * * with the counter-signature of the secretary, shall be presumed to have been properly made, drawn, accepted or endorsed, as the case may be, *for the company, until the contrary be shewn*; * * nor shall the president or directors or secretary of the company so making, drawing, accepting or endorsing, or assisting to make, draw or endorse any such promissory note or bill of exchange, be thereby subjected individually to any liability whatever."

The defendant Cox and the secretary Read profess to have accepted this bill for the company, and not as individuals, and to hold them or either of them liable would be in contravention of the express declaration of the statute, that the president and secretary shall not, by reason of their so accepting, be subjected individually to any liability whatever. The defendant is to be held liable on the sole ground that the bill is not addressed in terms to the company, but merely to the president of the company, which office he happened to fill. Suppose the defendant Cox and Read, the secretary of the company, had drawn this bill on the defendant Hurdon in favour of the plaintiffs, and had signed it, "For the Midland Railway Company. George A. Cox, President, H. Read, Secretary;" would any one for

a moment doubt that under the above statute it was the draft of the company and not of the individual? Can, then, the mere fact that this bill was addressed by the drawer to the president of the company make the joint acceptance of Cox and Read for the company the individual acceptance of Cox, against the intention of the drawer, the acceptors, and the holders of the bill at its maturity?

The holders at maturity appear, by the protest attached to the bill and filed at the trial, to have been the Bank of Toronto, and they seem not to have regarded the defendant Cox as liable, but the Midland Railway Company, to whom notice of dishonour was given. I refer to this simply because it is said the Court should be extremely careful in unsettling the understood requirements of negotiable instruments, a statement of the duty devolving on the Court that I fully concur in. But I do not think we can be said to violate any rule of law when holding that an instrument shall carry into effect the intention of the parties to it or have no effect at all, and that it shall not be permitted to create a liability that its own language does not shew was intended, and the extraneous evidence clearly establishes was not intended.

If the language of this bill had shewn it to have been addressed to George A. Cox, president of the company, and it had been accepted by him simply by signing George A. Cox, president, he would have been liable under the authorities personally, because no extraneous evidence would be needed to make out that he was the drawee; and it would be unjust to the holder of the bill to hold that his right to recover was to be affected by evidence outside of the bill to shew that the acceptor was not to be personally liable, but that some third person or corporation, for whom he acted as agent, was the true party to the bill, and not himself. In the present case a very different state of things exists. The defendant is not named as drawee. He does not accept as drawee, but for the railway company, who were in truth intended to be the drawees, the reason and consideration for the draft being their indebtedness to

the drawer. Suppose that between the date of draft and acceptance a change of presidents had taken place, which would have been drawee, the one that accepted, or the one that was president when the draft was drawn? If the rule of law is sound, that none can be the acceptor of a bill except the drawee named therein, or some one for his honor, then, clearly, in the case I have put, the president accepting was not the one named in the bill, but an entirely different person, the title not being intended to designate the office but the person filling the office.

I think, in arriving at the conclusion I have, no decided authority is interfered with. In *Herald v. Connah*, 34 L. T. N. S. 885, where the defendant was held liable on a bill addressed to him by name and the description of general agent of a certain insurance company, and accepted payable at 8 York street, Manchester, on behalf of the company, Baron Bramwell says, "I do not think we can find any authority that directly bears on this case. We must look to the instrument itself, and see what the parties intended, as that intention appears on the face of the document. And in the first place, I think it convenient to look at the meaning of the bill before it was accepted. To whom was it addressed? To Connah. If it had been intended that the bill should be addressed to the company it should have been so addressed in plain words. But it is not so addressed: it is addressed to H. Connah. It is true the bill describes Connah as a general agent; but still it is directed to him in his own name, and the rest is mere matter of description, shewing the reason why it is addressed to him. * * It is true it is drawn on a man described as an agent, and for a policy, and that the consideration for the bill therefore comes from the company, but the fact of the consideration moving from the company is no reason why the defendant should not be personally liable.

This language would seem to militate against the defendant in this case; but, taken with what follows, the opinion of the learned Baron would seem strongly

to support the defendant's contention. He goes on to say: "It (the bill) was drawn on Connah; of that there can be no doubt. Now as to the acceptance. I agree with the remark that has been made, that it may be there is no valid acceptance, but it is to be presumed in favour of a valid acceptance unless the acceptor unmistakably notifies that he is not accepting in accordance with the effect of the draft. What is the acceptance here? It says, 'Accepted payable at 8 York street, Manchester, on behalf of the company.'"

Now I hold that the right way for a person who is accepting for another, to notify that he is so accepting, is for him to use such words as '*accepted for*,' or '*per proc*;' but here the defendant makes use of no such expressions. The words used in the bill are not the ordinary words used to shew that the acceptor is accepting as agent."

In the case now under adjudication, the bill is not addressed to the defendant by name, but to the president of the railway company, and the defendant in express words accepts for the company, and the acceptance has the additional signature of the secretary, Thereby the acceptance, in the language of Baron Bramwell, "unmistakably notifies" that defendant and the secretary are accepting on behalf of the company, and in so accepting in like manner unmistakably notify their interpretation of the address. Then to construe their act, *ut res magis valeat quam magis pereat*, we should hold the bill to have been drawn on the company, as it was in the form in which bills were usually drawn on and accepted by them according to the evidence, and being drawn on, was properly accepted under the charter of the company to bind them. To hold the defendant not liable will not in any manner impugn the correctness of the decision in *Laing v. Taylor*, 26 C. P. 416, for there, as in *Herald v. Connah*, the bill was addressed to the defendant, and the letters denoting he was treasurer of the railway company, were matters of description merely. It was simply by reason of this description, and the fact that the consideration for the bill was the debt of the com-

pany, that he sought to escape the personal liability which the unexplained acceptance of the bill imposed upon him.

I have found no case in its circumstances exactly resembling the present, and while anxious to avoid a decision in any way unsettling the law relating to negotiable instruments, I think it equally important not to impose an obligation on the defendant which neither he nor any party to the bill, while it was current, thought or acted on the faith that he had incurred, and which he had the assurance of an Act of Parliament he was not incurring when he signed his name to the bill in the manner he did.

I have considered the several authorities cited on the argument, but as they all differ from this in their circumstances, I make no special reference thereto.

Rule discharged.

KINGSTON STREET RAILWAY V. FOSTER ET AL.

Railway—Subscription for stock—Condition as to payment in goods.

Defendants subscribed under seal for certain shares in the capital stock of the plaintiffs' company, promising and agreeing with each other and with the plaintiffs to pay the full amount of the shares as and when payable :

Held, that the evidence, set out below, shewed only a collateral agreement or representation by the president of the provisional board that payment would be accepted in goods, and not a subscription conditional on such acceptance.

Semble, that if the evidence had shewn such a condition made verbally, it could not have varied the unqualified subscription under seal, or bound the company.

The defendants after such subscription paid ten per cent. on the stock, being advised, as they alleged, by the plaintiffs that it was their best course to get rid of the stock by assignment, which could not be permitted until such payment: *Held*, clearly an irrevocable adoption of the stock.

ACTION against shareholder to recover calls on stock.

The defendants pleaded, among other pleas, that their subscription was upon condition that they should not be

liable to pay the amount of the shares, or any part, in money, but that the full amount thereof should be taken out in hardware, averring their readiness to supply hardware, and stating the neglect of plaintiffs to order it, and the completion of plaintiffs' works.

The case was tried before Blake, V. C., at the Chancery sittings held at Toronto 2nd June, 1879.

At the trial the following was the material part of the evidence :

R. M. Foster said : "Mr. Morrison and Mr. Taylor applied to my brother to subscribe for stock. When they came they spoke to my brother about taking \$500 in stock and my brother refused. He then came to me and told me what they wanted, and I replied, saying that we had no money to go into any subscription or investment of that sort. Mr. Morrison then proposed that if we would take the subscription that they would take it out in hardware : that they were building or were to build some stables, in Kingston, and that no cash would be required : that the stock would be taken out in hardware. It being put in that way we finally consented, otherwise we would not have consented to subscribe. We got no notice of allotment. On receiving a letter to pay up, I went to see Morrison, and he came in and said our stock was cancelled ; he said by a vote of the company. I asked Morrison why the steps had been taken after our agreement, and he then explained that the reason why they did not take it out in hardware was, that the buildings had been given out by contract, and it left nothing to be bought. Morrison distinctly stated that no cash would be required, for we refused to subscribe on condition that we should pay for the stock in cash. Morrison was president, and Mr. Taylor secretary of the company."

John Taylor (Secretary, said : "The same notice of calls was given to defendants as to the other stockholders. The stock was subscribed for on the 16th August, 1876. I was present when defendants subscribed. There was no agree-

ment that calls were to be paid in goods, in my presence, although some statement was made as to the probability of hardware being wanted, but it did not take the form of an agreement or out and out conditions being attached to it. I would reply to his proposition, that, as stables were to be erected, and much hardware wanted, there was no doubt that something would be wanted in that way. It did not take any definite shape. The first annual meeting was held on August 5th, 1876, according to the minutes. I see the word 'cancelled' in lead pencil opposite the subscription of James Foster & Sons. I do not know who put it there. I do not know what the defendants said on the subject of hardware. I was not closely with them during the conversation. Morrison did make some reference to hardware, that there would be stables to build. He said it in a jocular sort of way, but I do not think it took a solid form. I would not swear it did not. I don't know but I heard one of the defendants say that they had not the money to put into any subscription of the kind. There was an arrangement with Bryce that he should get the contract for the stables on condition that he took the stock. My recollection of the conversation (with the Fosters) is not distinct, for I was walking round the shop. The arrangement spoken of might have been made with Morrison. Mr. Morrison and I were members of the firm of Morrison & Taylor. There is a resolution remunerating Mr. Morrison, for his services 'in selling stock,' with 25 shares of paid-up stock. Our conduct was approved of by the board in a general way. Mr. Morrison did not say that they should get orders for hardware provided stables were constructed. He said they were going to build stables, and would require hardware, and would take the amount of subscription out in hardware. There was a resolution on November 13th regarding the cancellation of stock, but we did not consider that was a cancellation. There were no pencil marks in the books when I handed them to the auditor, Mr. Magill, in December last. The pencilling is his."

J. R. Foster said: "On Mr. Morrison's first application

we refused to subscribe. He and Taylor called again in a week. Morrison said if we took stock he would guarantee we would receive orders for the payment of it in hardware, and said we would not require to pay any cash, that the value of the stock would be taken out in hardware: that they were building stables and would require the material. In subscribing we did not rely on his influence to get us the contract for the hardware; we expected to receive orders from the company to pay for the stock. When we received notice of the call I went to see Morrison but could not find him. I saw his partner Mr. Morse, one of the directors, and explained that the company had not sent any orders for hardware, and that we did not want to have anything to do with the thing. He then advised me to pay the 10 per cent. and he would see that it was transferred to somebody else. He said it could not be transferred till a portion was paid. On that we paid the 10 per cent. The next we heard of it was in the shape of notice of suit. Morrison was seen subsequently about no orders having been sent, and he advanced this theory about the stock having been cancelled; he said the contract had been given out for the building in Kingston *en bloc*, and therefore they could give no orders. He said the stock had been cancelled, and dictated a letter to the secretary to that effect."

J. L. Morrison said: "I said to the defendants that it was more than likely that we should require \$500 in hardware, in the event of us building the stables as a company, and not let it out by contract: that we would be likely to require it. There was no definite way mentioned. We made arrangements that they would subscribe for stock, and of course the young men stated that they did not want to take this stock. And they said to me exactly what many others said at first, that they did not know much about Kingston, or about railways; and I said that we must get up the stock list, and I used all the arguments I possibly could to get names, and I said it was more than likely that we would not require a cent in cash: that if we did build

the stables ourselves we might require the most of the hardware. I made no agreement or bargain that it was to be taken out in hardware. I was not authorized by the company to make an agreement of this kind. The stables were afterwards built by contract. Did not report any arrangement with defendants to the board of directors."

Cross-examination : "The conversation with defendant was a long time ago, and I remember the most of it. My recollection is as distinct as it is possible for a man to have after four years. My memory is not very good. It is just barely possible that I might be mistaken as to what occurred. I might have been refused a subscription by Fosters, but I do not remember. I have not a distinct enough recollection to say that defendant J. R. Foster did not say that they were not in a position to pay cash. It was certain stables would have to be built, but there was a doubt about our building the stables as a company. It was present to my mind that the whole thing might be let out by contract. I thought it likely. I did not tell the defendants that Bryce built the stables. I told him I thought he would get the contract for the job. The indirect promise to him must have been made by me. I cannot say whether Bryce's subscription was promised before or after the defendants'. I did not tell the defendants that we had agreed with Bryce that he should have the contract for the stables. I did not try to influence the board to give orders for hardware; there was no use in doing it when the contract had been let out. It had been let out at that time. I did not tell the board that I had inveigled the defendants into this transaction, nor that I had assured the defendants that I would try to put the hardware contract in their way. I have no doubt that the defendants subscribed on the faith of what I told them."

The learned Vice Chancellor found for the plaintiffs as against the defendants James R. and R. M. Foster, for the amount of the claim; and for the defendant James Foster as having been improperly joined in the action.

August 28, 1879. *J. B. Clarke* obtained a rule *nisi* upon the plaintiffs and the defendants James Foster to shew cause why the verdict should not be set aside, and for a new trial, or to enter a verdict for the defendants, on the grounds: 1. That it did not appear by the evidence that defendants ever became owners or holders of the said stock. 2. That it appeared that defendants subscribed for the said stock to be paid for in hardware, and not in cash; and plaintiffs did not take any hardware, but rendered the contract incapable of performance. 3. That the contract between the parties was rescinded and abandoned. 4. That defendants were induced to subscribe for the said stock by false and fraudulent representations of the plaintiffs and their officers. 5. On the law and evidence.

December 4, 1879. *Cattanach*, shewed cause. Although various points are raised in the rule the real question for decision is, whether the defendants James and Richard Foster, who subscribed for ten shares and paid ten per cent. on them, are liable to pay the balance. They base their repudiation of liability on the ground that their contract was not to pay in cash but in hardware; and in support of this they allege that a contract was made with them at the time of subscription by the president of the company, who solicited their subscription, and whose acts they say bound the company, by which they were to pay only in a certain event and by furnishing goods. Supposing oral testimony to be admissible, the onus of proving any such agreement is on the defendants; and as the evidence is in favour of the plaintiffs, or at any rate conflicting, the words of the subscription must govern. But even admitting the agreement, it could not be binding on the company for two reasons; one being that the "subscription," or superscription rather, was an undertaking not only with the company but with each of the other subscribers to pay calls; so that the company, and much less the president, could not, without the sanction of all the other subscribers, of which defendants had express notice, relieve the

defendants from paying in cash. The other reason is, that the president could not bind the company unless agency were proved, which is not the case. The reasons for excluding the representations of an officer of a company acting without authority, are much stronger in a case of this kind than they are in such cases as *Wilson v. Ginty*, 3 App. R. 124, and *Newman v. Ginty*, 29 C. P. 34, where the representations were made while the company was in a provisional state. After a company has emerged from a provisional state, there is only one way in which it can act, viz., through a board of directors. The cases digested in *Lindley on Partnership*, 3rd ed., pp. 1461-3, shew this, especially *Gibbons's Case*, p. 1468, and *Nichols's Case*, p. 1462.

Foster, contra. There was no allotment of stock, no certificate given, no scrip issued. A payment of \$50 was made, but it was made after repudiation of liability, and at the express instance of a director, to enable the defendants to be relieved of the stock. A resolution was then passed intending to forfeit the stock; the word "cancelled" was written in the subscription book opposite defendants' signature; the president informed the defendants that the stock was cancelled; and the defendants never availed themselves of the privileges of a shareholder, in reliance on what had been communicated to them, as regards the subscription. The action is by the company, not by a creditor of the company. The evidence shews that the president and secretary of the company, after its complete organization, and their election to their respective offices, applied to the defendants to subscribe for stock without success, but the application being renewed, the president represented that hardware would be required, and relying on that representation the defendants retracted their refusal and consented to subscribe on the condition that hardware would be accepted in lieu of money. As regards what occurred at the time of subscription, the evidence of two of the defendants was clear; the contradicting evidence of the president was equivocal, and at

variance with his subsequent conduct when he led the defendants to believe that their subscription had been cancelled, and was not entitled to credence in the face of his own admission, that at the time of subscription the company required no hardware, as they had abandoned the idea of building the stables, and had actually let out the work to a contractor, with whom the president had made arrangements similar to that he was proposing to the defendants. The contract was not in its nature illegal or detrimental to the company. There is no principle in law whereby shareholders may not stipulate with a company when and in what manner he shall pay his shares: *Bullivant v. Manning*, 41 U. C. R. 521, 526. There is nothing to prevent a company from agreeing to take payment in money or money's worth: *McIntyre v. McCracken*, 1 S. C. 521, *per* Strong, J: A person who contracts to take shares under any condition can only be compelled to do exactly what he contracts to do: *Brice on Ultra Vires*, 355. By accepting the shares the shareholder agreed to pay in money or money's worth: *McIntyre v. McCracken*, 1 App. R. 7, *per* Draper, C. J. There are many cases where such a contract was recognized: *Shackleford's Case*, L. R. 1 Chy. App. 567; *Schroeder's Case*, L. R. 11 Eq. 131; *Elkington's Case*, L. R. 2 Chy. App. 511; *Pellatt's Case*, *Ib.*, 527. It was considered that contracts to pay otherwise than in money could only be rendered illegal by legislation: *Spargo's Case*, L. R. 8 Chy. 407, *per* James, L. J.; and the Imperial Act of 1867, relative to companies, declared shares to be deemed issued subject to the payment of the whole amount in cash, unless the contract was in writing and duly filed. So that *Re Church and Empire Fire Ins. Co.*, L. R. 6 Chy. Div. 681, and the cases following it, do not apply here. Though express authority does not appear to have been given to the president and secretary to make such a contract, yet they were the proper executive officers, and acted within the apparent scope of their authority, and openly exercised a power which presupposed a delegated authority: *Brice*, 427; *Field on Corporations*, 192;

Barnes v. Ontario Bank, 19 N. Y. 158 ; *President, &c., of the Bank of the United States v. Dandridge*, 12 Wheat. 64 ; *Bedford R. W. Co. v. Bowsen*, 48 Penn. 29. When a person goes to a company's office and finds there the proper officers to give answers, and on the faith thereof purchases stock as paid up, when in fact it is not, the company is bound : *Re British Farmers' Co.*, L. R. 7 Chy. Div. 538, *per James, L. J.* The acts of the president and secretary in the mode of procuring subscriptions was ratified by the directors : *Olcott v. Tioga R. W. Co.* 27 N. Y. 546. Shares were allotted to these officers for "selling the stock." The contract for building the stables was awarded upon a similar agreement made by the president with the contractor. A contract made even with all the promoters may be ratified by the company after the company comes into existence : *Spiller v. Paris Skating Rink Co.*, L. R. 7 Chy. Div. 368. *Wilson v. Ginty*, 3 App. R. 124, relied on by the Judge at the trial, is inapplicable, as there the company was organized, the alleged contract was with a provisional director, and the conclusion in fact was adverse ; besides the action was by a creditor. The subscription was obtained by misrepresentation of the officers of the company, and therefore the enforcement of calls should be restrained : *Rees Silver Mining Co. and Smith*, L. R. 4 H. L. 64. Estoppel prevails against a company, just as against natural persons, and under the circumstances this company is estopped from setting up the defence of *ultra vires* : *Re British Farmers' Co.*, L. R. 7 Chy. Div. 533, 3 App. Cas. 1004. If the condition were not a part of the contract then there was no material agreement. If the condition was part of the contract, and the contract were *ultra vires* as to the condition, then the whole falls. It is competent to establish the condition by parol evidence : *Fitzgerald v. Grand Trunk R. W. Co.*, 27 C. P. 528 ; *Mason v. Scott*, 22 Gr. 592. If the condition must be regarded as a collateral agreement, then the defendants would have the right of set-off. Had the defendants paid up the calls in hardware, it cannot be contended that they could be compelled to pay over again in cash.

December 27, 1879. HAGARTY, C.J.—As to there having been no allotment of the shares subscribed for, we think that quite enough is shewn within the authorities collected in such cases as *Nasmith v. Ginty* and *Nasmith v. Manning*, 29 C. P. 34.

The document to which defendants' names (about 16th August, 1876,) are subscribed reads thus :

“ We, the undersigned, do hereby subscribe for the number of shares set opposite our respective names in the capital stock of the ‘ Kingston Street Railway Company ;’ and we do each, for himself and his assigns, promise, and agree with each other and with the said company to pay the full amount of the said respective shares, as follows, that is to say, in calls of 10 per cent., at such times as by the directors or provisional directors of the company may be determined, or as the construction of the line may require.”

Defendants sign and seal this, and in the column of “ No. of Shares,” they write 5.

A large number of subscribers appear, both before and after their names.

On the face of this writing it is clear the defendants represent themselves as subscribers for \$500 in money, and the contract professes to be not merely with the company, but interchangeably with all their joint adventurers.

As to the allotment question, the defendants, in October following, paid \$50, the first call of 10 per cent. This, I think, renders all further notice of this point unnecessary.

The defence is, in effect, that they did not subscribe for shares payable in money, but payable in hardware, in which they were dealing ; and that they were induced to subscribe on the representation or promise of one Morrison, then president of the provisional board, that payment would be taken in hardware, and no money would be demanded or required.

It is not necessary, I think, for the disposal of this case to regard the position of these plaintiffs in the same light as that of a judgment creditor suing for the amount of unpaid stock. Nor need we regard it as it might be, if,

with reasonable promptitude and before making any payment of calls, the defendants had applied for relief, to have their name staken off the list of subscribers, as having been obtained by fraud or misrepresentation.

We may, I think, dispose of it on our view of the facts.

Sitting as a juror I should, without any hesitation, have found that the defendants' subscription was unqualified; that it was an agreement to pay in money the amount of the stock.

I would have found that, even if Morrison had authority to bind the company, all he did or said was collateral, that the company would either certainly or probably purchase hardware from defendants for their buildings to an amount as large as the subscription.

The defendants, no doubt, believed that Morrison would get such custom for them, and were willing to undertake to pay for the stock on that prospect. But whether the hope was verified or disappointed the subscription remained payable like the rest of the stock.

If the evidence shewed (which I think it did not) that this was in truth a qualified subscription, payable not in cash but in hardware, many very grave questions would arise.

The sealed contract is, on its face, to pay cash. Could it be varied by a parol agreement varying the mode of payment? The contract is with all the other joint adventurers. Could it be shewn that while the bulk of them subscribed in good faith to pay cash into the common fund, these defendants were to pay, in effect, not \$500, but that sum less twenty or thirty per cent. profit on hardware delivered at ordinary selling rates.

Again, what power is shewn, on the evidence, existing in Morrison to bind this corporate body to any such secret bargain? There is no evidence that the company ratified, even if they could do so, any such special privilege to defendants.

The defendants' contention, if sound, must be that they never were liable to pay in money. But they paid in

October the call of ten per cent. They say they did this, being advised it was their best course, to get rid of the stock by assigning it to some party, and that this could only be permitted after payment of the ten per cent.

But such a proceeding must surely be held to be a direct irrevocable adoption of the stock, and of the right of disposing thereof.

Nothing but the most direct and unquestionable evidence should induce Judges of fact to find that a company entered into a bargain so utterly improper and unfair towards *bonâ fide* stockholders as that a subscription, professedly payable in money, was to be paid in goods to be delivered at a profit by these particular subscribers. It may be quite possible that promises were freely given that defendants should be favoured by orders for goods, but this would be a wholly different matter.

I think the learned Vice-Chancellor considered that any promise or inducement held out by Morrison was collateral to the unqualified subscription by defendants for stock payable in cash.

We need not discuss whether defendants have any remedy against either the plaintiffs, as a company, or Morrison individually.

In any event, it may be presumed the measure of damages would probably be their loss of profit on the sale of \$500 worth of hardware.

As to the alleged cancelling, it rests wholly on the appearance of the word "cancelled" written in pencil in the stock book after the entry of \$50 paid. It rests on no legal action of the company.

Our view of the facts renders it unnecessary to consider the authorities cited by Mr. Foster in his very able argument.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

REGINA V. THE COLLEGE OF PHYSICIANS AND SURGEONS
OF ONTARIO.

*Medical practitioner—Registration in England—Refusal to register here—
Mandamus.*

A medical practitioner, registered in England under the Imperial Medical Act, is entitled, without examination, to practise in Ontario, on payment of the proper fees; and that though his registration in England has been after July, 1870; and a mandamus will therefore be granted to the proper authorities here to admit him to registration on payment of such fees.

On the 18th of December, 1879, *Kingstone* obtained a rule *nisi* calling on the defendants to shew cause why they should not admit to registration, and enter, or cause to be entered, by the registrar of the said College, the name of Albert Elhanan Mallory in the book or register of the said College, as being duly qualified and licensed to practice medicine, surgery, and midwifery, in the Province of Ontario, and as a member of the said College.

It appeared, from the affidavits filed, that the said Mallory had been duly registered under the Imperial Act, known as the Medical Act, on the 5th of April, 1879, and that on the 9th of May following he applied to the Registrar of the College of Physicians and Surgeons of Ontario to be registered under the "Ontario Medical Act," (R. S. O. ch. 142,) paying him the registration fee of \$10, but that the college refused to enter his name upon their register.

November 27, 1879. *Crooks*, Q. C., shewed cause. The question raised is, whether the provisions of the Ontario Act, under which this college has been incorporated, justify its council in refusing to admit to their register the applicant, notwithstanding his being upon the Imperial medical register. The college contends that it is entitled to impose such conditions upon such applicants for registration here as in its judgment it may think proper; and the college has required that all those upon the Imperial medical register since

1870 should successfully pass the examination in the regular subjects prescribed for the final examination, and should also pay certain fees. About a year since Dr. Baldwin presented the same question for the consideration of the college, and the council then thought fit to accede to his request, upon the assumption that the Imperial Act might be held to govern in such a case, and with the intention on the part of the council to make such representations to the Imperial authorities as would preserve in the future the authority conferred upon the council by the Provincial Act. The council considered that an express provision of the British North America Act of 1867, under which that authority was conferred, had been violated by the British Act of 1868; and that upon this being represented to the Imperial Government the jurisdiction of the Provincial Legislature would be allowed its full effect. As the subject is before the Imperial Government for consideration, the council consider that if this Court were to decide that the Imperial Act overrides the Provincial Statute, it would be an additional reason for the Imperial Government limiting their Act, so as not to conflict or interfere with the jurisdiction of the Ontario Legislature. The case is therefore *sui generis*. It is not a question of *ultra vires*, but of a Provincial Act on a subject which, by the 93rd section of the British North America Act, is within its exclusive jurisdiction to deal with. Formerly there were some five bodies whose degrees or examinations would entitle to practice. These facilities led to abuse, and justified the general opinion, which was carried into effect by the Provincial Act, that there should be a uniform course of study and system of examination for the license to practice in Ontario. The college in its course requires not only theoretical knowledge to pass the final examination, but proof of practical experience as well. It is well known that the circumstances of this country involve more general knowledge on the part of the practitioner, if he is to be successful, than in England, where the duties are so much distributed. The legislation, which was intended to secure

guarantees of efficiency, has already produced a greatly improved condition in this respect. The primary examination is now a valuable protection against ignorance, and the curriculum insisted on shews that the course of study is one which ought to secure the competency of one person in all the branches, just as in the case of one person being solicitor, attorney, and barrister at the same time; and this is no less required by the circumstances of the country. Here the Legislature of Ontario is found exercising its clear authority in passing an Act not only within its jurisdiction, but its "exclusive jurisdiction," conferred upon it by the 93rd section of the B. N. A. Act, and upon a subject which concerns the welfare of Her Majesty's subjects in this Province. Should not full effect therefore be given to an Act passed by the Provincial Legislature on a subject committed to it by the Imperial Parliament, and which is one of the subjects which clearly come within the jurisdiction exclusively resting with the Provincial Legislature? The Act which is invoked in answer to this is the Imperial Act, passed the 29th May, 1868, (cap. 29, 31 Vict.,) which extends the 31st section of the "Medical Act" of 1858. The question depends upon the legal principles which should be applied to such an Act, having regard to the B. N. A. Act of 1867, and the condition of matters at the time the Act of 1868 was passed. Persons registered under the Medical Act of 1858 had no right, by virtue of such registration only, to practice in the Province of Ontario, and had to rely on such provisions as were made in their favour in the Provincial Statute. Hence the attempt of those who were instrumental in securing the passing of the Act of 1868 would have evidently been to include this Province as well as other dependencies of the Empire. Hence in section 2 we find the word "Colonies" given a very extensive interpretation, and which, *primâ facie*, would constitute registration under the Act of 1858 full authority to practise in any part of Her Majesty's Dominions, including those possessing Legislatures as well as Crown colonies. To this extent,

therefore, the argument is against the college; and it is upon this that the other side relies. Before, however, any of the express powers granted by the British North America Act, either to the Dominion Parliament or Provincial Legislatures, can be repealed, the Imperial Parliament must have used language sufficiently clear and explicit to shew that such repeal was intended by the Imperial Parliament, and not to be the result of general words which do not indicate the grave and important step Parliament was about to take, restricting in its effect the unlimited jurisdiction conferred on the Provincial Legislatures by the 93rd section of the B. N. A. Act. The argument, therefore, is that, when in 1867 the Imperial Parliament thought fit to grant to the Provincial Legislatures the whole jurisdiction and duty over education in the Provinces, and embodied this as an important article of a formal constitution, then, before the jurisdiction can be considered to have been withdrawn or in any way limited, the Imperial Parliament must be shewn to have done so by express words which would unequivocally shew that it was the deliberate intention of the Imperial Parliament to infringe upon this Provincial jurisdiction, and to deprive the Legislature of its rights and duty of exercising its judgment in the matter. This, again, would involve such a change in the policy of the whole scheme of Confederation, by which this and other subjects were exclusively confined to the local Legislatures, and which, as recited in the B. N. A. Act, was in the nature of a compact between the United Kingdom and the several Provinces, that if there ever was a case for the application of the principle contended for this is a case of the kind. Effect can be given to the Imperial Act without carrying it to the extent of being an invasion of Provincial rights; namely, by giving to registration on the British Medical Register the same status in the Provinces when further conditions have not been lawfully imposed by the Sovereign Legislative authority of any such Province. The position would then be very much like that in *Smiles v. Belford*, 1 App.

Rep. 436, where the Court held that, in order to obtain the complete benefit of an Imperial copyright in Canada, it was necessary for the publisher to bring his work within the Canada copyright Act as well. The college, under the authority of the Provincial Act, requires an examination from all practitioners who are on the British Medical Register since 1870, and it insists on *every one* being up to its standard of examination before being entitled to be placed on the Provincial Register. This is the only question which has given rise to the present dispute. The proper view, and the one which removes all conflict between the Imperial and Provincial jurisdiction, is to construe the position granted under the Imperial Act of 1868 as subject always to the exercise of such authority as the Provincial Legislature has had committed to it. This is a stronger case than that of *Smiles v. Belford*, for in it no exclusive jurisdiction has been given to Canada, nor had the Imperial Parliament expressly assumed to deprive itself of its general jurisdiction in matters of copyright. This argument is not going too far, for when we find in the Constitutional Act of 1867 the Imperial Parliament making clear provision for an exclusive jurisdiction in certain specified subjects in this Province, and in the following year passing another Act which does not assume to refer to such specially conferred authority, it would be to impute to the Imperial Parliament such a hasty change of intention as would be opposed to the whole course of its proceedings. There is, in truth, such repugnancy between the assumed operation of this Act of 1868 and the full jurisdiction expressly conferred by that of 1867, that upon this principle also of repugnancy the Act of 1868 must be limited in its effect, as contended for. The duty imposed on the Provincial Legislature for the welfare of its community is not fulfilled by requiring that the fees only should be paid, but it is bound to go further and to require that medical efficiency in this Province should be secured by such means as in its judgment it may deem best. It would be a dereliction of such

duty to omit to do this, and especially where one of its beneficial results is, the great improvement in the standard of medical education, and the progress of medical study and higher training in the medical schools, not only in this Province, but elsewhere where medical study may be pursued. The Legislature and council of the college have not exceeded this duty, and the examination is only a reasonable regulation. Applicants for registration are only subjected to the payment of the fees for registration and examination as in all other cases, and such applicants are not placed in any worse position than a graduate with a medical degree obtained in the Provincial University here. It is always open for the Legislature to impose checks upon any unreasonable regulation or one which would be prohibitory or unfairly discriminate between the two classes of applicants. It is also always open to the Dominion Government to disallow Provincial Acts, just as Dominion Acts may be disallowed by the Queen in England. The cases discussed in *Maxwell* on the Interpretation of Statutes, pp. 157, 164, support the proposition that general Acts do not repeal Acts conferring special powers or privileges. No enactment has been passed in modern times of such gravity as the Constitutional Act of 1867, and it is well known that all its provisions were as carefully discussed and considered as if it had been a compact between independent nationalities. It was necessary, it is true, that it should assume the form of an Imperial Act, but it was intended to be lasting and permanent, and therefore only subject to alteration after the like consideration by the contracting parties; and certainly it would be a surprise if the powers and authorities thereby deliberately conferred were to be liable to restriction or limitation in any Session of the Imperial Parliament without previous communication with, or reference to, the relatively independent Legislatures thereby established. Such would be an infringement of that liberty of governing ourselves and of managing our own affairs which was granted to us by the B. N. A. Act, and which necessarily involved new

relations between the Dominion Parliament and the Legislatures of the different Provinces and the Imperial Parliament. It would take by surprise any of the statesmen who had to do with Confederation in 1867 to find that in the first year thereafter an Imperial Act was passed which, if the contention on the other side prevail, would deprive this Province of one of the powers expressly conferred upon it. While the 93rd section is explicit as to the Provincial jurisdiction over education, yet the argument is applicable also to any infringement of the full jurisdiction which is given to the Province over local or provincial subjects. Where the jurisdiction has been expressly given, then it is further necessary that there should be express and particular words in order to effectually repeal express and particular powers granted by the former Act of Parliament. Without such particular words it cannot be said that the Legislature meant to take away these powers, especially when there was no reservation to that effect. In the case before Lord Hatherley, when Vice-Chancellor, (*Fitzgerald v. Champneys*, 2 J. & H. 54,) he says: "The Legislature is presumed not to alter a former provision by any subsequent general enactment, unless it is conveyed in specific language." So that something more is required before it can be held that the provisions of the Act of 1868 were intended to infringe upon this provincial jurisdiction. It does not assume to do this, but is only an enabling Act under which the practitioner may place himself in an authorized position to practice, but not to free himself from other conditions which may be imposed by such Legislatures as have been expressly authorized to do so. If the contrary is held, the consequences will be serious. It will be a blow to that exclusive jurisdiction of the Provincial Legislatures in local matters, which was the chief cause for bringing about the Canadian Confederation, and if within the ordinary exercise by the Imperial Parliament of its powers it can as readily affect the legal profession, and even the jurisdiction of the Dominion Parliament on larger subjects, even that of the tariff. In fact

the B. N. A. Act would cease to be regarded as possessing the fundamental qualities of a constitution or system of government. The Court of Appeal, in *Smiles v. Belford*, pointed out the necessity there was, in order that British copyright might be effectual here, that a Canadian one should also be obtained, or that there should be further legislation in Canada. If it was intended that the Imperial Parliament should retain power of authorizing practitioners on the British Medical Register to practise in Canada on such terms as that Parliament should think fit to prescribe, it should have reserved this in the B. N. A. Act. The whole scope and framework of that Act show that it intended to give to the people of Canada, in their Dominion and Provincial relations, the fullest rights of self-government according to the principles of the British Constitution, the same in all Canadian matters as the people of the United Kingdom enjoy. The expression in the Act of 1868, "notwithstanding any Legislature," can not properly be construed to apply to restrain any such powers in the future as have been exercised by the Legislature of this Province under the circumstances mentioned. The position that it was a necessary and beneficial measure on the part of the Ontario Legislature to pass its Act in 1869 is further established by experience since, as the college has been found to have succeeded in thoroughly fulfilling the objects for which it was incorporated, in raising the qualifications of medical practitioners throughout this Province. There is no doubt that if the attention of the Imperial Parliament had been called to this Act, and to its operation as is now contended for, it would have been deemed such an interference with the provisions of the Confederation Act passed in the previous year that this Act would never have received the assent of the British Parliament, or have become law. The mischief of such interference would have been readily seen, and its results prevented by proper provisions inserted therein for the purpose.

Kingstone, contra. Dr. Mallory is entitled to be regis-

tered in the medical register of the Province of Ontario, for he has proved, and it is not disputed, that he has been duly registered in the medical register of the United Kingdom. Being so registered he is, apart from the late Imperial Act, entitled, by virtue of the Medical Act, 1858, (22 Vic. ch. 90, sec. 31), to practise medicine and surgery in any part of Her Majesty's Dominions. By the Imperial Act, known as The Medical Amendment Act, 1868 (31 Vic. ch. 29), a power which they had not before was conferred on Colonial Legislatures, to make laws for enforcing the registration in the Colonies of persons registered under the British Medical Act; but while conferring that power the Imperial Legislature chose to impose on the Legislature exercising that power a certain condition, namely, that in the event of the Legislature requiring gentlemen registered under the British Medical Act to be registered in the Colony, those gentlemen should be entitled to be registered in the Colony, on payment of the fee prescribed for registration.

The Legislature of the Province of Ontario took advantage of this Act, and by 37 Vic. ch. 30, (ch. 142 of Rev. Stat. O.) compelled gentlemen registered under the British Medical Act to be registered in this Province. See secs. 31, 40, 42, 43, 44, 45, and 55. These gentlemen are therefore entitled, on payment of the fees, and without submitting to any examination, to demand registration with the Medical Registrar of this Province.

It has been argued that sec. 93 of the British North America Act conferred on the Province of Ontario the exclusive right to legislate respecting education, and that this question of education is one of registration, and that the Legislature of Ontario has given the College of Physicians and Surgeons the option of refusing to admit to the Medical Register of Ontario gentlemen registered under the British Medical Act.

There are two answers to this argument. In the first place, the exclusive power referred to is "exclusive" merely as regards the Dominion Parliament, and has no reference

to the Imperial Legislature. See sec. 91, subsec. 10, where exclusive powers conferred on the Dominion, cannot be construed to exclude legislation by the Imperial Parliament, but merely that by the Local or Provincial Legislatures. See also *Smiles v. Belford*, 1 App. R. 442.

In the second place, the words of the Imperial Act of 1868 are positive and distinct, and leave no room for argument as to what their meaning is, and the Act is later than the British North America Act. It is therefore simply a question of the paramount right of Legislation vested in the Imperial Parliament. That the Imperial Parliament has such a right see *Routledge v. Low*, L. R. 3 H. L. 100: *Broom's Com.* vol. 1, pp. 120, 126, 191; *Stephen's Com.* vol. 1, 125.

The College of Physicians and Surgeons is not injured by being compelled to register those registered in the United Kingdom, for the College had no corporate existence until after the Medical Act of 1858 had been passed, and the Act of 1868 was a relaxation of the law in favour of the College, by enabling it to enforce registration of those registered under the British Medical Act, though preserving the right of the latter by enabling them to claim registration as a right.

The answer to the analogy sought to be established from the local laws relative to English Barristers is, that there is no Imperial Statute defining their position in Canada. Some reference has been made to a by-law of the college, whereby gentlemen claiming registration under the provisions of the Imperial Act are required to pay a fee of \$40 instead of the usual fee of \$10. Such a by-law is clearly bad, as an evasion of the law; but it is not necessary to consider it here, as Dr. Mallory's fee was paid and accepted by the College before the by-law was passed.

December 27th, 1879. HAGARTY, C. J.—In the manner in which the matter has been argued and placed before us, we understand that, apart from technical objections, our opinion is desired as to the right of the defendants to

refuse registration to a regularly qualified and registered practitioner, under the Imperial Act known as the Medical Act, without submitting to the examinations prescribed by the rules of the defendants' College.

This applicant has paid, or offered to pay, the ordinary fees required for registration.

Shortly before Confederation the then Parliament of Canada passed the Act (1865) 29 Vict. ch. 34, providing for a register of licensed practitioners, and for the admission thereto on a fee of \$5 for qualification obtained up to 1st of January, 1866, and not to exceed \$10 for qualification obtained thereafter. Schedule A contained a list of persons qualified for registration, amongst them medical or surgical degree or diploma of any University in Her Majesty's Dominions, diploma or license as physicians or surgeons from the Royal College of Physicians or Royal College of Surgeons, London, or a certificate of registration under the Imperial "Medical Act" 21 & 22 Vict., or any Act amending the same.

The British North America Act, passed 29th of March, 1867, sec. 93, declares the Provincial Legislature "may exclusively make laws in relation to education."

On the 24th of March, 1874, the Ontario Act, 37 Vict. ch. 30, was passed to amend and consolidate the laws relating to the medical profession in Ontario, repealing previous Acts. The main provisions appear in Rev. Stat. O., ch. 142, sec. 24. All persons qualified under schedule B prior to July, 1870, may register on payment of a fee of not over \$10; and (sec. 25) all persons not so qualified should submit to examination. This section B (as in the Act of 1865,) allows as a qualification the certificates of registration under the Imperial Medical Act, or any Act amending same.

But as the present applicant obtained his Imperial qualification long after 1870, it is urged here that he cannot claim any privilege therefrom.

Sec. 23 leaves it optional with the Council to admit to registration persons registered in Great Britain, on such terms as the Council may deem expedient.

Sec. 25, as to a person not qualified under schedule B: besides examination he must pay such fees as the Council may by general by-law establish.

On behalf of the applicant, the Imperial Act 21 & 22 Vic. ch. 90, and the amended Act of 1868, hereafter cited, are strongly relied on.

The Imperial Act (1858) established a Medical Council and Register. Sec. 31 declared that every person so registered should be entitled to practice medicine and surgery "in any part of Her Majesty's Dominions."

The Imperial Statute, 31 Vic. ch. 29, was passed on the 29th May, 1868. It recites that by sec. 31 of the "Medical Act," 21 & 22 Vic. ch. 90, it is enacted that every person registered under this Act shall be entitled, according to his qualification or qualifications, to practise medicine or surgery, as the case may be, in any part of Her Majesty's Dominions, and to demand and recover in any Court of Law, with full costs of suit, reasonable charges for professional aid and advice and visits, and the costs of any medicines or other medical or surgical appliances rendered or supplied by him to his patients.

It enacts (2): "The term 'Colony' shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a Legislature as hereinafter defined, except the Channel Islands and the Isle of Man. The term 'Colonial Legislature' shall signify the authority other than the Imperial Parliament or Her Majesty in Council competent to make laws for any Colony."

3. "Every Colonial Legislature shall have full power from time to time to make laws for the purpose of enforcing the registration within its jurisdiction of persons who have been registered under the 'Medical Act,' any thing in the said Act to the contrary notwithstanding; provided, however, that any person who has been duly registered under 'The Medical Act' shall be entitled to be registered in any Colony, upon payment of the fees (if any) required for such registration, and upon proof, in such manner as the

Colonial Legislature shall direct, of his registration under the said Act."

The case on behalf of the defendants was argued by Mr. Crooks in a very fair and candid spirit, admitting, as of course was necessary, with the Federation Act before us, that if the Imperial Parliament distinctly legislate for us they can do so, notwithstanding any previous enactment or alleged surrender of the power of exclusive legislation on any subject. But it was ably urged that, as the subject of Education was one in which the exclusive right was given to this Province, we should read the subsequent Imperial Act as not interfering with the right so granted.

To this it may be argued that where the Federation Act speaks of any such exclusive right, it means exclusive as opposed to any attempt to legislate by the Dominion Parliament.

But it appears to us that the language of the Imperial Act already cited is too clear for dispute. It declares pointedly and most distinctly that a person on its register shall be entitled to registration in any colony on payment of the fee (if any) required for such registration; and the definition of "colony" clearly includes Canada.

It is impossible for us to refuse to these clear words their equally clear interpretation. It must be borne in mind that at the date of Confederation the Imperial Act of 1858, with the general words, "in any part of Her Majesty's Dominions," was in force, and that in the amending Act of 1868 the Imperial Parliament was legislating for over forty colonial possessions of Great Britain, and not merely for the British Isles.

It was hardly, in any view, an unreasonable assumption that for such a diversified empire, with so many colonies in various stages of national development, to take it for granted that a scientific qualification deemed sufficient for the advanced civilization of the parent State would be willingly accepted as sufficient for the empire at large.

It would have been, perhaps, not free from reasonable objection to have admitted to practise in England every

person said to be qualified by any local law in any of the colonies. It would have been, perhaps, painfully invidious to except any one or more of the Queen's possessions, on the assumption that it had attained a higher level in medical education.

We do not think it necessary to discuss a question suggested rather than argued, as to the right of defendants to require persons claiming registration without examination to pay any increased fee demanded by them.

Mr. Crooks did not press any such point, and we do not feel inclined to impute to a body of gentlemen representing the medical profession in Ontario, standing so deservedly high in public repute, a desire to do more than to ascertain their legal rights, and not to evade their performance, or induce submission to an unlawful requirement, by the imposition of what may be termed "differential duties" against those who may seek to make this country their home, on the faith of the general law of the Empire.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute.

FITCH V. KELLY ET AL.

Promissory note—Presentment—Alteration—Ratification—Evidence—Set-off.

Held, 1. That the evidence set out below warranted the jury in finding that there had been a sufficient presentment of the note in question, for that the person who, on the day when it fell due, was at the place where defendant had carried on business, and to whom it was presented, was there as representing the maker, and the place was the maker's office for the day.

2. That even if the note—given for a composition agreed upon with the creditors of an insolvent, of whom the plaintiff was one—was altered after the endorsers had signed it, by adding the words “with interest at seven per cent.,” there was ample evidence (set out below) to shew that it was so altered while in the hands of the assignee, to conform to the original intention and agreement of the parties, and that the endorsers subsequently assented to it.

When the plaintiff proved his claim against the insolvent's estate he held, as collateral security, certain overdue notes, which he did not mention, and he afterwards received certain payments on them: *Held*, that such payments could not be allowed as a set-off in this action under R. S. O. ch. 50, sec. 142.

DECLARATION against maker and endorsers of the following promissory note:

“TORONTO, 18th October, 1877.

“Fifteen months after date I promise to pay to the order of James Hickey and Thomas Hickey ten hundred and seventy-eight dollars and seventy-two cents, at my office, Toronto, value received, with interest at seven per cent.

“JOSEPH J. KELLY.”

Averment of presentment, dishonour and notice thereof.

The defendant Kelly pleaded:

1. *Non fecit*.

2. Payment.

3. That the note was avoided by being materially altered by writing in the words “with interest at seven per cent.”

4. Set off.

The defendants James Hickey and Thomas Hickey pleaded:

1. That Kelly did not make.

2. That neither endorsed.

3. Denial of presentment.

4. Denial of notice, by James Hickey.

5. Denial of notice, by Thomas Hickey.

6. (By James Hickey) that the note was avoided by being materially altered without his consent by adding the words "with interest at seven per cent."

7. By Thomas Hickey, a similar plea.

8. By both, want of stamps.

Issue.

The cause was tried before Burton, J. A., and a jury, at the last Assizes at Toronto, when it appeared that Kelly, being in business in the city, was unable to meet his engagements, and was made an insolvent, one Munro becoming assignee: that at the first meeting of creditors the following offer was made:

"INSOLVENT ACT OF 1875, AND AMENDING ACTS,

"In the matter of J. J. Kelly, an Insolvent,

"I hereby offer to pay a composition of forty cents in the dollar, payable, the two-fifths in monthly instalments, and the remaining three-fifths in nine, twelve and fifteen months, with interest at seven per cent., secured by William Hickey, James Hickey, and Thomas Hickey.

Toronto, 18th October, 1877. "JOSEPH J. KELLY."

"And we, the said William Hickey, James Hickey, and Thomas Hickey, hereby agree to secure such composition.

"WILLIAM HICKEY,

"JAMES HICKEY.

"THOMAS HICKEY."

This offer was accepted by the creditors, but fell through owing to the death of William Hickey, and another meeting of the creditors was held and the following offer made and accepted:

"INSOLVENT ACT OF 1875, AND AMENDING ACTS.

"In the matter of J. J. Kelly, an Insolvent,

"I hereby offer to pay a composition of forty cents in the dollar, payable two-fifths in monthly instalments, and the remaining three-fifths in 9, 12, and 15 months, with interest at 7 per cent., secured by endorsement of James Hickey and Thomas Hickey.

Toronto, November 14, 1877. "JOSEPH J. KELLY."

"And we, the said James Hickey and Thomas Hickey, hereby agree to secure such composition.

"JAMES HICKEY."

The following was signed by Thomas Hickey :

"November 13, 1877.

"Notwithstanding the demise of our late brother we are still willing, as far as we are concerned, to carry out the arrangements made between J. J. Kelly, his creditors, and us.

"THOMAS HICKEY."

Accordingly a deed of composition and discharge was made and executed, dated November 14th, 1877, by which Kelly covenanted to pay to each of his creditors a composition of forty cents in the dollar on the claim of such creditor against him in the manner and at the times following, namely, sixteen cents in the dollar, in six equal monthly instalments of two cents and two-thirds each, on the 18th day of each month, the first of such instalments to be paid on the 18th day of November, 1877, and the remaining twenty-four cents in three equal instalments of eight cents each, at the expiration of nine, twelve, and fifteen months, respectively, from the date thereof, with interest at seven per cent. per annum on the three last named instalments, and to give to each his promissory notes for such composition payments, bearing date 18th day of October, 1877, and payable at the said several dates respectively, and endorsed by James Hickey and Thomas Hickey.

This deed was executed by Kelly and by the required number of his creditors, among whom was James Hickey.

The notes referred to in the deed of composition were all endorsed by James Hickey and Thomas Hickey, and handed by Kelly to the assignee, and by him handed over to the respective creditors. The note sued on was one of these notes, and was handed by the assignee to the plaintiff in respect of his claim, he being a creditor of Kelly. The words "my office, Toronto," and "with interest at seven per cent," were in the handwriting of a clerk of the

assignee, and the residue of the note in that of another clerk of the assignee. James Hickey, as a creditor, received his notes drawn up in conformity with the arrangement, one of which—produced at the trial—the twelve months note, had the words “my office, Toronto,” and “with interest at seven per cent.” filled in in the same handwriting as the note sued upon.

On the 25th of February, 1878, Kelly made a chattel mortgage to James Hickey and Thomas Hickey, to secure them against their liability in respect of the notes endorsed by them, wherein was contained the following recital: “Whereas the parties of the second part (James and Thomas Hickey) have endorsed the several promissory notes of the party of the first part (Kelly) for the sum of two thousand five hundred and eighty-five dollars and seventy-three cents, of lawful money of Canada, which said promissory notes are as follows:” they are all dated 18th October, 1877, and those at nine, twelve, and fifteen months bear interest at seven per cent.” An affidavit in accordance with the statute, of the *bona fides* of this chattel mortgage, was made by each of the Hickeys.

The Hickeys professed their ignorance of the contents of the chattel mortgage, and of the contents of the several offers of composition, alleging they had not read them.

The defendants, Kelly's wife, Gallooly, Smith, Wilson, and Lewis Kelly, all gave evidence in support of the contention of the defendants, that the note sued on had been materially altered after it was handed to the assignee, by the addition of the words “at my office, Toronto,” and “with interest at seven per cent.,” Kelly swearing that about two weeks after he handed the notes to the assignee, he was in the assignee's office talking over some matters, when the assignee said to him, “by the bye there should be interest on the nine, twelve, and fifteen months' notes; I forgot to put that in. I suppose I had better add it in:” that he, Kelly turned the conversation to something else, and that was all that was said about it: that he did not authorize him to put it in. Another contention was, that

the note had not been duly presented when it fell due at Kelly's office.

The note was discounted by the plaintiff at the Bank of Commerce, and on the day it fell due it was protested, and by the protest it was certified that the notary exhibited the note to Mr. John Hickey at the office of Joseph J. Kelly, 136 York street, at Toronto, and demanded payment, to which demand John Hickey answered, "I cannot pay this. I do not think Mr. Kelly has provided for it."

A clerk of the Bank of Commerce was called, and stated that on the day the note fell due it was placed in his hands for presentment: that he looked up the directory, and found that 136 York street was Kelly's place: that he went there, and saw a person there, and asked him if Mr. Kelly was in. He said he was not in just now, and asked witness to leave the matter till Kelly came in. He did so, and a party came in who was said to be Kelly. The man who was inside said, "Here is Mr. Kelly now." The witness swore he believed this man was Kelly: that he saw him in Court, but could not swear positively to him: that he presented the note to him, and he said he could not pay it.

The notary's clerk swore that he went with the note to 136 York street; saw Mr. Oliver there; handed the note to him, who said he knew nothing about it, but perhaps a gentleman there, whom he pointed out, would. Witness presented the note to the gentleman, who said his name was John Hickey, and gave the answer set out in the protest.

Kelly swore that on the 21st of January, 1879, the day the note fell due, his office was at 11 King street west: that he took this office on the 15th or 18th of January, and held it about a month, and that from June, 1878, till the 15th of January, 1879, he had no office: that his wife was carrying on a provision and meat business at 136 York street from the middle of July, 1878, till towards the end of November, 1878, and he was hired by her by the month: that afterwards Oliver & Archer occupied these premises: that he knew John Hickey, who lived near the toll gate on

the Lake shore : that he was his brother-in-law : that he did not know where John Hickey was on the 21st of January : that nobody represented him at 136 York street that day, nor was he there himself.

Oliver was called as a witness, and swore that he carried on business at 136 York street, and had done so since the 25th of November, 1878, when he bought out Mrs. Kelly : that on the 21st of January a man came there and asked him if he could stay there all day, as he had some business to transact. He stayed in the back room. He made it his business to answer the questions of several persons who presented notes there for payment. Oliver did not know who this man was. Had a conversation with him about the toll-gate. He said he was on a toll-gate. He came in the forenoon and stayed till after dark. Oliver never heard the name Hickey mentioned all day. He swore that Kelly was not there that day.

John Hickey was not called as a witness. The plaintiff tried to procure him to be subpœnaed. He was at Kelly's house, Kelly swore, the night between the two days of the trial. He was a brother of the defendants Hickey.

After the plaintiff had proved his claim against Kelly's estate, certain notes which he held as collateral security for his claim, and which were overdue at the time he proved it, and which he did not allege or value as security in his claim, were paid in whole or in part; and there was a further contention on the defendants' part, that the money received in payment of these notes was the subject of set-off in this action, and ought to be set off against the amount of the note sued for.

The learned Judge charged the jury as follows:—"In this action the defendant Kelly rests his defence, in the first place, upon the ground that he did not make this note. Now, as regards him, whatever may be said of the sureties, it is perfectly manifest that during the whole period in question here, he was perfectly well aware that what the creditors stipulated for, and what they intended to receive, was notes payable with interest at seven per cent. The alteration, if

alteration there were, I hardly consider, as far as he was concerned, a material alteration. According to his own account he saw Munro shortly after the notes were drawn, and then Munro called his attention to the fact that the words with reference to the interest had not been inserted, and asked permission to make the alteration; but that he, the defendant Kelly, then turned the conversation, as he said, so as to evade giving an answer. Now, I think you may reasonably assume that he did, by his silence, give authority to Munro to make the alteration. I think, therefore, that, as far as the defendant Kelly is concerned, there is abundant evidence either that the note was originally made as it is now, or that he consented to the alteration being made in it which it is said has been made. But the case against these other defendants stands on a very different footing. It is quite clear that if an alteration of this kind were made, even with the consent of Kelly, without the knowledge of these sureties, they would thereby be discharged from their liability, unless it was done with their assent or subsequent ratification, because such a change would materially alter the nature of their contract. The Hickeys are not liable if they endorsed these notes without the words relating to interest being in them, unless they gave authority to Kelly or to some one else to insert them, or they subsequently ratified their insertion, which you may come to the conclusion that they did if you find they knew of the contents of the mortgage which has been produced. Then the sureties raised this further defence—and there may possibly be something in it—that before an endorser can be made liable, it is absolutely necessary that the note shall be presented to the maker, or at the place where it is made payable. Probably, in the case of a note made payable in a particular place, it would be absolutely necessary, so far as the sureties are concerned, that the note should be presented at that place in order to render them liable. I am inclined to think it would be necessary, in order to make the endorser liable, to present the note at the particular place mentioned in the body of the note. If a person

makes a promissory note payable at the Bank of Montreal, that is, a note payable generally, and if he wants to make it there only, he has to add the words 'not otherwise and elsewhere.' I do not take that to be the case with regard to an endorser. I am aware that that view has been questioned; but I still have the very strongest conviction that that is the law. But I do not know that the question arises here. This note in its altered state, if it were altered, is payable at the office of the maker. I do not think I am going too far in asking you to infer that this person who was at 136 York street was there as the agent of Kelly, and that that place was treated by him as his office for the purpose of the presentment of this note. If you do so, I think that you may find that issue in favor of the plaintiff, viz., that the note was properly presented at the office of the defendant Kelly."

Exception was taken to the learned Judge having told the jury that the addition of the words, "with interest at seven per cent.," so far as the defendant Kelly was concerned, was not a material alteration; as also to his having told them that what took place between Kelly and Monro, if it did take place, amounted to an authority to the latter to make the alteration; that nothing but express authority was sufficient.

It was further objected that the act of taking a mortgage, with the recitals and the affidavit of the mortgagees, was not evidence of a ratification; and to the jury being told that under the circumstances detailed in evidence it was competent for them to infer that Hickey was sent to 136 York street by Kelly, thus making it his office, and that if they did so they were to find that issue in favour of the plaintiff.

A verdict was entered for the plaintiff and \$316.97 damages, and leave was reserved to move to reduce it, in the event of the Court holding that the defendants, or either of them, were entitled upon the record to recover the amount of the notes not valued by the plaintiff in his proof.

December 3, 1879. *J. E. McDougall* for defendant Kelly, and *Falconbridge* for defendants Hickey, obtained a rule *nisi* to set aside the verdict, as being contrary to law and evidence, and for the misdirection above complained of, or to reduce the verdict by the amount of money received by the plaintiff after he proved his claim, from the payment or part payment of notes held by him as collateral security overdue when he proved his claim.

December 3, 1879. *McMichael*, Q. C., with him *J. A. Patterson*, shewed cause, citing *Hughes v. Snure*, 22 U. C. R. 597; *Hine v. Allely*, 4 B. & Ad. 624; *Burbridge v. Manners*, 3 Camp. 193; *Daniell* on Negotiable Instruments, II., 359, 1118, 1119, 1221, 1123; *Cariss v. Tattersall*, 2 M. & G. 890.

McDougall and *Falconbridge*, contra. The notary's duty was to present at Kelly's house when he got the answer he received at York street. Then, as to the set-off. The general law on this is inapplicable here. They referred to *Chitty* on Bills, 10th ed., 245; *Montague* on Set-off, 2nd ed., 128; *Ex parte Hanson*, 18 Ves. 232; *Ex parte Burn*, 2 Rose 55; *Ex parte Barratt*, 1 Gl. & J. 327.

December 27th, 1879. ARMOUR, J.—There was ample evidence to justify the jury in finding either that the note sued on never had been altered, or, if altered, that such alteration had been made with the previous authority of the defendants; or that having been made without their previous authority, it was subsequently assented to by them.

It was the agreement of the defendants, evidenced by the offers of composition, that this note should bear interest at seven per cent., and if altered, as alleged, it was altered while in the hands of the assignee and before it was issued to the plaintiff, and was so altered in order to effectuate such agreement.

It is laid down in *Byles* on Bills, as follows:—"There are, however, two cases in which an alteration in a material part will not vacate the instrument; first, where such an alteration is made before the bill is issued or become an available instrument; and, secondly, where the bill is

altered to correct a mistake, and in furtherance of the original intention of the parties.”

Whatever effect the alteration, if such there was, of this note may have had upon its validity, it was an alteration which effectuated the agreement of the parties to it, and was not a criminal act, and so could be subsequently ratified by the parties affected by it, and the note in its altered form would thus become a valid instrument.

There was evidence, in my opinion, well warranting the finding of the jury either that 136 York street was, on the day the note fell due, the office of the defendant Kelly, or that he had constituted that place his office for that day; or that John Hickey was there on that day representing him, and authorized by him to receive and answer the presentment of the note in question with other notes falling due on that day; any of which findings would support the verdict on the issue as to presentment.

The evidence on this point, particularly that of Oliver, is extremely suggestive, and leaves little, if any, room for doubt.

As to the misdirection complained of, I think the learned Judge might have expressed himself in a manner less open to objection; but we ought not to be too eager to find fault with remarks made by a learned Judge in his charge to the jury, nor ought we to weigh with nicety in the scales of criticism expressions which he has made use of: See *Lucas v. Moore*, 3 App. R. 602. Before we grant a new trial for misdirection, we ought to be satisfied that the expressions made use of induced the jury to come to a wrong conclusion.

This was the way in which misdirection was viewed before our statute, which provides that “a new trial shall not be granted on the ground of misdirection, unless in the opinion of the Court to which application is made, or of any Court of Appeal, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.”

I do not think that by reason of anything said by the learned Judge any substantial wrong or miscarriage has

been occasioned in the trial of this suit, and that we are therefore precluded from granting a new trial on this ground.

The money claimed by the defendant Kelly by way of set-off cannot, we think, be properly allowed. It is not, in the words of the Act, R. S. O. ch. 50, sec. 142, "a payment, claim, or demand, which in its nature and circumstances arises out of, or is connected with the notes sued on, or the consideration thereof:" see *Hughes v. Smure*, 22 U. C. R. 597.

The rule will therefore be discharged.

HAGARTY, C. J., and CAMERON, J., concurred.

Rule discharged.

IN RE GILCHRIST AND THE CORPORATION OF THE TOWNSHIP
OF SULLIVAN.

By-law--Defects on face of--Validity--Practice.

Where by one clause of a by-law to grant a bonus of \$30,000 to a railway the last instalment of principal and interest due upon certain debentures to be issued under it was made payable on a day named, being ten days beyond twenty years from the day on which the by-law was to come into force, but by the preceding clause the debentures were to be payable in twenty years at furthest from that day, the Court refused to quash.

The by-law shewed the whole ratable value of the property of the municipality to be \$668,293, and directed a rate of three and nine-tenth mills in the dollar. It appeared that the rate directed to be levied would produce about \$150 less than the total amount of the debt to be incurred, but on this ground also the Court would not interfere.

On the return of the rule Counsel for the Corporation desired to support it, and tendered affidavits for that purpose, but *Held*, That after the issue of the rule such affidavits could not be received from any party to strengthen the applicant's case.

February 7, 1879. *F. Osler* obtained a rule *nisi* from Cameron, J., sitting alone, calling upon the corporation of the township of Sullivan to shew cause why by-law No. 12, passed in 1878, to aid the Georgian Bay and Wellington R. W. Co., by a grant of \$30,000, and for the issue of debentures therefor, should not be quashed, on the grounds,

among others, that the last instalment of the debt thereby incurred was made payable on a day more than twenty years after the day for the by-law taking effect; and that the said by-law was otherwise defective on the face thereof.

The by-law in question,—after reciting the statutory power of any municipality interested in the construction of the said railway to pass by-laws granting bonuses thereto, and to issue debentures for raising money to meet the same: that the township of Sullivan was desirous of aiding said railway by a grant of \$30,000 and issuing debentures therefor: that \$22,622 would be required to be annually raised by special rate for payment of said debt and interest: that the whole ratable value of the property of the municipality was \$668,293; and that for paying the annual instalments of said \$30,000 and interest it would require an equal annual special rate of three and nine-tenth mills in the dollar—set out the instalments of principal and interest that would be required for each of the twenty years, and then proceeded, among other things, to enact:

1st—"That it shall be lawful for the reeve of the said township for the time being, and he is hereby authorized and required for the purpose aforesaid, to issue debentures of the said municipality for the sum of thirty thousand dollars, and interest thereon at the rate of six per cent. per annum, corresponding to the above instalments of principal and payments of interest together in sums of not less than one hundred dollars each, payable in twenty years at furthest from the day hereinafter appointed for this by-law to take effect, which debentures shall be sealed with the seal of the said municipality, and shall be signed by the reeve and countersigned by the treasurer thereof for the time being."

2nd—"That the said debentures shall be made payable in accordance with the said instalments of principal and payments of interest, one falling due in each year for twenty years next after the day hereinafter named for the

coming in force of this by-law, on the thirty-first day of December in each year, payable at the branch of the Merchants' Bank in the town of Owen Sound, without any interest thereon, and that the said debentures falling due in any year shall be as near as may be the same in amount as those falling due in the other years."

3rd—"That for the purpose of paying the annual instalments of principal as set out above, and the payments of interest as set out above, as the same shall successively become due, an equal annual special rate of three and nine-tenth mills on the dollar shall be raised, levied, and collected in each year, upon all the ratable property in the said municipality during the continuance of the said debentures or any of them."

4th—"That this by-law shall take effect and come into operation on the twentieth (20th) day of December A.D., 1879."

It appeared, on a calculation, that the instalments of principal and interest set out would fall short by about \$150 of the total amount required to pay off the debt to be incurred.

December 5, 1879. *J. K. Kerr*, Q. C., shewed cause. The statutes affecting this matter are 41 Vic. ch. 47, secs. 18, 19, 20; 42 Vic. ch. 56 sec. 4. The by-law was passed under the former Act, secs. 18 and 20 being those affecting it. As to the twenty years appearing on the face of the by-law to be exceeded, the objection taken is not the true reading of it; the preceding clause must be read in connection with and as interpreting it, and thus there is no violation of the Act. Then, as to the amount being short, this objection is not taken by the rule, and at any rate is a mere matter of calculation and a mistake in arithmetic, which will not vitiate the by-law. The further objection is, that the by-law is "otherwise defective." This is too general, and does not point to any particular defect which can be met. He referred to *Holden v. Town of Belleville*, 39 U. C. R. 88; *Lloyd v. Township of Elderslie*, 44 U. C. R. 235.

James Maclellan, Q. C., appeared for the present township council, and was called upon to shew cause, but stated that he intended to support the rule, and tendered affidavits in support of it; but the Court refused to allow them to be read, stating that after the issue of a rule no affidavits could be filed by any party for the purpose of strengthening the case of the applicant.

Maclellan, Q. C., and *Moss*, then supported the rule. A previous by-law for the same purpose was defeated. This was carried by improper means. The reeve made no appointment of scrutineers, as required by the statute, on the day appointed, but appointed them at some other time, and he totally disregarded the provisions of the Act in doing so. He appointed men who were all favourable to the by-law, instead of some on both sides. The irregularity is fatal. If not, it should incline the Court to listen with favour to other formidable objections. The by-law was carried at the end of the year. The council that passed it was turned out, and the present council is opposed to the by-law, and believes the returns were fraudulent. The objection that the last bond is not payable for more than twenty years cannot be answered. The by-law says in general terms that the payments are not to exceed twenty years, but afterwards positively directs the very days on which they are to mature. These provisions cannot be reconciled. One of the prescribed days is too remote. Another objection is, that the rate prescribed is insufficient to pay the principal and interest, three and nine-tenth mills on the dollar. The value of the ratable property, as stated in the by-law, will produce a sum \$150 less than the debt to be incurred. This is a violation of the provisions of the Municipal Act. It may be said the sum is small; but the statute is imperative. *It "shall be sufficient."* It is said this is a matter of calculation, and a mere error of arithmetic. Still the answer is, that this is a vital point, and the statute says it shall be sufficient, which it is not. The cases referred to do not apply. The errors of calculation in these cases were sought to be established by affi-

davit, by shewing that mistakes had been made by municipal officers, and that the recitals in the by-law were erroneous. The present objection is apparent on the face of it, and requires no affidavit to establish it. If the rate may be deficient \$150, what is the limit of the allowable deficiency? And yet the statute says, it shall be sufficient, that is, it shall not be deficient at all.

At the conclusion of the argument,

HAGARTY, C.J., stated that the Court had come to the conclusion not to quash the by-law: that the by-law properly provided that the debentures should be payable in twenty years at farthest from the day appointed for the by-law to take effect; and that the slight subsequent error, as to ten days beyond the twenty years, need only affect the last debenture: that, under all the circumstances, the Court felt it ought not to interfere, the spirit of the statute not having been violated, and the technical error being reducible to very trifling dimensions: that, moreover, a late statute had legalized all these proceedings, subject to the relator's application. See 42 Vic., ch. 56, sec. 4.

Rule discharged.

HEBNER V. WILLIAMSON,

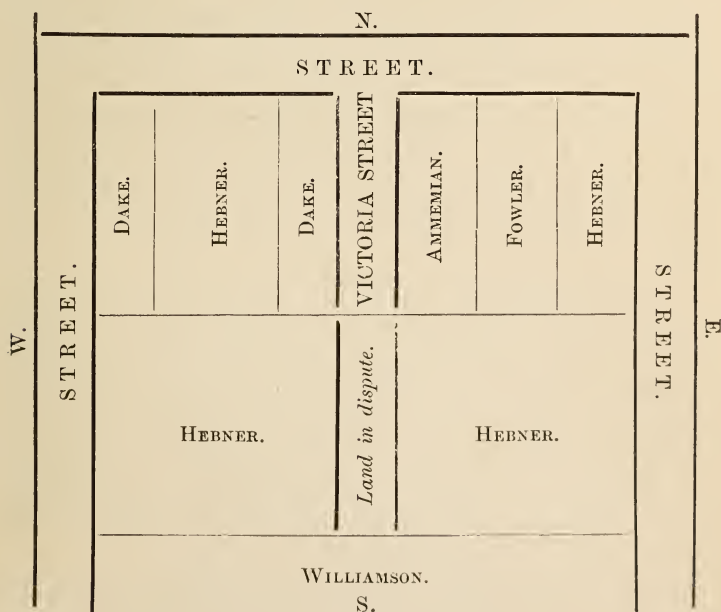
Deed—Exception—Right of way.

E. owning land through which Victoria street ran part of the way, from N. to S., conveyed to the plaintiff four acres S. of that street, "with the exception of continuing Victoria street across said lot." Afterwards E. conveyed to W. by a statutory deed 65 acres adjoining plaintiff's land on the south, and W. conveyed to defendant.

Held, CAMERON, J., dissenting, that by the deed to the plaintiff the continuation of Victoria street was excepted out of the land conveyed: that upon the evidence, set out below, this continuation was when E. conveyed to W. a way actually used across the plaintiff's land to W.'s land, and so passed by the deed to W. and from him to defendant, who was therefore not liable in trespass for entering to repair the way.

Per CAMERON, J.—The deed to the plaintiff contained only a reservation of a right on E.'s part to continue the street, and the evidence shewed no dedication to the public or justification for defendant's entry.

THIS was an action of trespass to the piece of land marked "land in dispute" on diagram below, being part of lot 15, broken front concession, West Oxford:—



Pleas : Not guilty, not the plaintiff's land, *liberum tenementum*.

Issue.

The cause was tried before Galt, J., and a jury, at the last assizes at Woodstock, when it appeared that one Thomas Elliott was the former owner of all the land to the south of Victoria street, and to the south of the village lots to the east and west of it, shewn on the diagram : that on the 24th of June, A.D., 1854, he conveyed to the plaintiff "all and singular that certain parcel or tract of land and premises situate, lying and being in the township of West Oxford, in the county of Oxford, in the said Province, containing by admeasurement four acres, more or less, being composed of part of lot No. 15 in the broken front concession in the township of West Oxford, commencing where a stake has been planted on the line between the east half and west of the said lot on the south side of the village of Centreville" (that is, on the street at the southwest angle of the lot marked Dake on the diagram), "thence easterly, along the line of the village lots, 15 chains more or less, to the road between lots 14 and 15, thence southerly along the said road 2 chains and 75 links, thence westerly, parallel with the village property, 15 chains to the centre of the said lot 15, thence northerly 2 chains and 75 links to the said village property, *with the exception of continuing Victoria street of the village of Centreville across the said lot.*"

It further appeared that on the 9th of November, A.D., 1869, the said Thomas Elliott, by a deed made in pursuance of the Act respecting short forms of conveyances, conveyed to one George Williamson all the land owned by him to the south of the land conveyed by and mentioned in the deed to the plaintiff, containing about 65 acres, and on the 30th day of August, A.D., 1871, the said George Williamson, by a like deed, conveyed the said land so conveyed to him to the defendant.

Elliott was examined as a witness at the trial, and stated as follows : "I made that exception (in his deed to plaintiff)

because I thought it would be a great deal more convenient for me having a road across the four acres. It was for my own convenience I made the reservation. I used the road all the time. It might possibly be the next summer after I sold to Hebner that I spoke to him and told him I wanted to use the road. The four acres went across the whole lot. The next spring I told him I wanted to use the road. Mr. Hebner then went and fenced the road out on the east and west sides. I used the road whenever I wanted, all the time I owned the farm, fourteen or fifteen years, up until I sold to Williamson. I do not think there was a fence on the north end of Victoria street as long as I owned it. Every person round Centreville used it. I used it the summer I sold to Williamson. I was living in Ingersoll, and it was my nearest way to the lot to drive in that way. I hired a man to put a ditch there. The bit of land was pretty wet; but after the ditch was put there we could drive through it, and did do so with light loads. There was a road on the east side for heavy loads. During all the fifteen years I owned the land Mr. Hebner never said anything to me about this bit now in dispute; but about a year after I sold to Williamson Mr. Hebner said to me: 'I wish you to give me a deed of that piece of land.' I said: 'No, even if Williamson does not want the road I will not give it to you.' Williamson had not given me much money down on the property. I had only \$500 on the land at the time Mr. Hebner asked me for the deed. I said to Hebner, 'There has been more money paid on farms and never finished paying.' I told him I didn't know but what Mr. Williamson might want the road. I told Mr. Williamson the road was there when I sold the farm. When I wanted to catch any sheep on my place I used to drive them into this road: it was just as good as a pen; in fact, I had the sole use of this road until the time I sold to Williamson."

On cross-examination he said: "There is a fence at the north end now. I cannot say how long it has been there. If there was a fence there at the time I sold to Williamson,

it was a fence I could put up and down. I guess there was a fence on the south side, but not on the north end: there was no fence there. I know nothing about the land since I sold it to Williamson. I do not think I have been across the lot a dozen times since. I really cannot swear if I have been across the piece in dispute since I sold to Williamson. I would not swear that there is a fence there now. For the last two years I had it, during the summer season, I would use the road two or three times a week, taking my horse to pasture; there was no fence then at the north end. I swear that there was no fence there. There were bars going into Mr. Williamson's field on the east side, but I did not go there; there were not bars at the north end; on the south side there were bars; I never let down a fence at the north end of the extension. I say there were neither bars nor fence there. I do not know whether there are bars or fence there now or not."

The plaintiff being in possession of the piece of land in dispute, the defendant claiming that he was entitled to a way over it, entered upon it in June last for the purpose of repairing it, and dug up some trees and made a ditch, and for this alleged trespass this action was brought.

The real contention of the defendant at the trial was, that he had a right of way over the land in dispute, and that of the plaintiff was that the land had become his by ten years' possession of it, and that such possession extinguished the right of way. The plaintiff adduced evidence in support of his possession for ten years, and the defendant adduced evidence in denial of that contention, and in support of his contention.

The learned Judge told the jury that the simple question was, did the evidence satisfy them that the plaintiff had had exclusive possession without interruption for at least ten years before the action was brought 20th June, 1879: that the proof was on the plaintiff, because he had no paper title to the land in question: that under the terms of the defendant's deed he had a right to use this right of way unless he had lost it by reason of the plain-

tiff having gained a title by the Statute of Limitations. Plaintiff's counsel objected to the learned Judge's telling the jury that the right of way reserved by Elliott passed by the deed to Williamson as it was not a right of way but only a right to extend Victoria street reserved personally to himself.

The jury found for the defendant.

November 18, 1879. *D. B. Read*, Q. C., obtained a rule *nisi* to set aside the verdict and for a new trial, on the law and evidence, and for misdirection of the learned Judge, on the following grounds: That the plaintiff established his title to and possession of the *locus in quo* and the trespass was proved, and none of the defendant's pleas were proved. 2. That the exception or reservation in the plaintiff's deed from Elliott was at most an easement personal to Elliott, never exercised by him, and conferred no right on the defendant to commit the trespass proven. 3. That the right excepted was limited, and gave no right to dig up or remove the soil or trees of the plaintiff. 4. That the learned Judge misdirected the jury in ruling that the plaintiff must satisfy the jury that he had had the exclusive right to use the property for at least ten years before this action was brought. 5. That the Judge's ruling in regard to right of way was foreign to the issues, and misled the jury.

November 26, 1879. *Robinson*, Q. C., shewed cause.

Read, Q. C., and *Ball*, Q. C., contra. The plaintiff had, at the time the trespass sued for was committed, actual possession as owner, and was entitled to maintain this action against the defendant a mere wrong doer: *Graham v. Peat*, 1 East 244. Under the plea that the land was not plaintiff's proof of possession is sufficient, and nine years possession was proved in this case: *Whittington v. Boxal*, 5 Q. B. 139; *Brown v. Dawson*, 12 Ad. & Ell. 624; *Asher et al. v. Whitlock*, L. R. 1, Q. B. 1. Defendant gave no evidence of title in himself, and it is not open to

him to set up the *jus tertii*, to rebut the possessory title of the plaintiff, unless he acted under the authority of such right, and no such authority was proved: B. & L. Pleading, 3rd ed. 417, note, and cases there cited. If defendant had a right of way the trespass proved was not necessary to the exercise of that right, and defendant therefore is responsible: *Rigg v. Earl of Lonsdale*, 1 H. & N. 923; *Stammers v. Dixon*, 7 East. 200. Defendant proved no title in himself, but relied upon the reservation in the deed from Elliott to plaintiff. The true construction of that deed is the reservation of a right personal to Elliott, the grantor, and of which defendant is not entitled to avail himself: *Wickham v. Hawker*, 7 M. & W. 63.

December 27, 1879. ARMOUR, J.—The real contention between the parties, as above stated, was fully gone into and fought out at the trial without any objection being made that the pleas did not appropriately raise the defendant's contention.

The proper mode of putting the defendant's contention upon the record would have been by pleading a right of way over the land in dispute, and that the entry was for the purpose of repairing the way, or by pleading *liberum tenementum* in Elliott and entry under Elliott.

But as the real questions in dispute between the parties were fairly tried, as if the suggested pleas had been upon the record, I do not think we ought now to interfere, because the defendant's contention could not have been properly shewn upon the pleas as they stood.

The first question then to be determined is, what effect is to be given to the words of exception in the deed from Elliott to the plaintiff?

The deed is evidently drawn by a layman, and the words of exception are very inartificially framed; but I think they should be construed as an exception out of the land conveyed of so much land as would be required for the continuing of Victoria street across the lot. The use of the word "exception" by the grantor would seem to

me to indicate that he intended to except or take out of the land conveyed land for the continuing of Victoria street across the lot, and I do not see by what other construction we can give effect to the words used. I cannot see that by any fair construction they can be held to be a reservation of a right of way. If so, however, to whom is the right of way reserved? If to the public, the reservation would be bad; if to himself, I think the words do not bear that construction, and a reservation of a right of way to himself would not authorize the public to use it. The grantee, the plaintiff, certainly thought the land was excepted, for about a year after Elliott sold to Williamson he asked Elliott to give him a deed of it. In *Parkhurst v. Smith*, Willes, 327, Willes, C. J., says: "It is said in our books that the construction of deeds ought to be favourable and as near to the apparent intent of the parties as possibly may be and as the law will permit. That too much regard is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect, for that the law is not nice in grants, and therefore it doth often transpose words contrary to their order to bring them to the intent of the parties; for neither false Latin nor false English will make a deed void if the intent of the parties doth plainly appear. I have collected these rules from Littleton, Plowden, Coke, Hobart, and Finch, persons of the greatest authority. But they are themselves so full of justice and good sense that they do not want any authority to support them, and I do not know that they were ever yet controverted. On the foundation of these rules, whenever it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to enquire into is what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all; but if the intent of the parties be plain and clear, we ought, if possible, to put such a construction upon the doubtful words of a deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it."

See also *per* Martin, B., in *Dodd v. Birchall*, 8 Jur. N. S. 1180.

I come to the conclusion, therefore, that the land in dispute is Elliott's land.

The next question is, as to the defendant's right to a way over it.

Elliott says that the next spring after he conveyed to the plaintiff, he told the plaintiff he wanted to use the road, and that the plaintiff then went and fenced the road out on the east and west sides, and that he, Elliott, used the road all the time he owned the farm, some fourteen or fifteen years, till he sold to Williamson. Elliott so used it, as it appears, as a road to the farm he sold to Williamson, and when he sold to Williamson he told him the road was there.

I think, therefore, that upon the evidence the road over this land in dispute was at the time of the conveyance by Elliott to George Williamson of the sixty-five acres, a way thereto belonging and appertaining, and therewith held, used, occupied, and enjoyed, and passed by force of such conveyance to George Williamson, and from him to the defendant. See *Staple v. Heydon*, 6 Mod. 1; *Washburn on Easements*, 225.

I think, therefore, the rule should be discharged, the jury having found against the plaintiff's contention as to possession.

HAGARTY, C. J.—I am of opinion that in the deed to the plaintiff Elliott excepts from the land conveyed sufficient parcel thereof to form the continuation of Victoria street across the land granted, and that we must so hold unless we defeat the clear intention of the parties thereto, as appearing therefrom. By continuing or projecting the lines of Victoria street a complete description by metes and bounds of the parcel excepted can be given.

The fee of this excepted parcel remained in Elliott.

When Elliot conveyed to Williamson in 1869, I think this was a way visible and in existence, and the right to

have access thereto and to pass over it went with the close granted, and passed afterwards to the defendant with the grant of the land. I treat it, on the evidence, as an existing visible way, the actual ownership retained in Elliott, and by him intended to be and declared to be part of a public street.

Plaintiff fails wholly, on the proper finding of the jury, to shew any possessory title, and I also think he has no paper title.

The matter in dispute is very small; even without further litigation its value may wholly disappear. A new trial would be disastrous to the parties. I think we are bound to make any necessary amendment of the pleadings to prevent any technical difficulty. All the facts have been fully discussed; no further light can well be looked for.

CAMERON, J.—I am of opinion the plaintiff made out his case at the trial. On the pleadings, as they appear on the record, there is no question about the matter. The evidence shewed at the time of the alleged trespass the plaintiff was in the actual visible occupation of the land, and so was entitled to maintain his action, unless the plea of *liberum tenementum* was made out, and there is no question that it was not. The *locus in quo* was the freehold of the plaintiff, unless it remained in Elliott, the person through whom both plaintiff and defendant claim, by virtue of the so-called exception in the deed from Elliott to him. By that deed, by apt and full description, a piece of land, including the *locus in quo*, was granted to the plaintiff, and to such description were added these words: "*With the exception of continuing Victoria street of the village of Centreville across the said lot.*" The plan or sketch put in at the trial shews that Victoria street above mentioned was opened to the North limit of the land conveyed by the deed containing the above exception. Elliott, the grantor, owned, in addition to the land conveyed to the plaintiff, about sixty-five acres to the south thereof, and it is probable at the time he conveyed to plaintiff he contem-

plated the opening of Victoria street through his remaining land and laying it out into lots, and so desired to retain the power of opening it across the land conveyed to plaintiff; hence the insertion of the exception in the deed. Previous to the sale there had been no use of this strip of land as a road, as it was part of the then owner's field sold to the plaintiff. The land, from its swampy character, was at that time not in a fit state for a road, if I rightly understand the effect of the evidence.

It is said exceptions, where they are ambiguous, should be construed most strongly against those making them. It would not appear that the words, "with the exception of continuing Victoria street across the lot" fairly mean, "I except from my grant to you, for my own use, a strip of land across the lot within the lines of Victoria street extended." They would seem more reasonably to mean, "I reserve to myself the right of continuing Victoria street across the lot." The grantee in that case would not have one part of the land purchased by him separated from another part without the right of crossing the excepted strip. This result would happen, however, if it be held that the exception means the grantor Elliott never in fact granted the strip and it still remains his property. The words are not apt or sufficient to create a private right of way in Elliott. The only question submitted to the jury was, had the plaintiff had uninterrupted possession of the land trespassed on for ten years, and the learned Judge told them he must satisfy them that he, the plaintiff, had the exclusive right for at least ten years before the action was brought; unless they were satisfied of that the plaintiff was not entitled to recover. He is also reported by the short-hand reporter to have said that "it is quite clear that there was a right of way excepted in the deed '*with the exception of continuing Victoria street of the village of Centreville, across the said lot.*' I am not sure but what the land covered by this road passed by that deed, unless Mr. Elliott chose to continue the exception (? street). You will see

that it is not that Victoria street is to extend across the lot, but he says he has the right to extend it." The counsel for the plaintiff then asked the learned Judge to charge the jury to the effect: "His (Elliott's) right consists only if at all in extending Victoria street." Whereupon the learned Judge said: "At present I tell you (the jury) that I think the right of way was excepted, and that therefore Mr. Williamson (defendant) had a right to use the right of way, unless he was barred by Mr. Hebner (plaintiff) having had the exclusive possession of it for over ten years.' Mr. Ball, counsel for plaintiff, objected to this charge, on the ground that it was incorrect to tell the jury that the right of way reserved by Elliott passed by the deed to Williamson, as it was not a right of way, but only a right to extend Victoria street, reserved personally to himself.

I think the exception was well taken; that the construction of the exception is, that it was a mere reservation of the right on the part of Elliott to continue Victoria street if he thought fit; that in fact by the deed from Elliott to the plaintiff the freehold was in plaintiff, subject to this right; and, assuming there had been a justification pleaded, by reason of a right of way in defendant, whether there was a way or not was a question of fact not submitted to the jury, and it ought to have been; that, way or no way, the soil was vested in the plaintiff, and the trespass committed by defendant was in excess of his right to use the way. There can be no question that the soil in a public highway, not assumed by the municipal corporation within whose jurisdiction it may be, may be vested in a private individual, and he may maintain trespass for injury to the same; that the mere actual possession of the *locus in quo* entitled the plaintiff to maintain trespass against a wrong doer, which the defendant would appear to be, until it is shown that the *locus in quo* was a way appurtenant to the land he bought from his brother, who claimed under Elliott.

The strongest way to put the defendant's case would be to assume that, by the exception in the deed, Elliott dedi-

cated the land in question to the public. A reservation of a right of way to strangers would, as my brother Armour has pointed out, be void. The words of exception were not sufficient to create a private way; but whether there was a dedication or not was a question of intention, and should it appear that Elliott only intended to open it up to the public when he might lay out the rest or other parts of his land into town or village lots, or to keep it for his private use, there was certainly no immediate dedication. He himself said, in answer to the question, "What did you make that exception for?" "Because I thought it would be a great deal more convenient for me having a road across the four acres." "It was for my own convenience I made the reservation."

I think, on this statement, it is impossible to say there was a dedication of the *locus in quo* to the public as a highway.

On the whole, I think there should be a new trial, in order that all the facts may be more fully brought out, with costs to abide the event.

Rule discharged.

REGINA V. RODDY.

Temperance Act of 1864—Conviction—Evidence in support of—Formal defects.

Notice to the Collector of Inland Revenue of the passing of a by-law under the Temperance Act of 1864, *Held*, sufficient, and that the by-law was in force, notwithstanding that the Inspector of Licenses had not been notified under R. S. O. ch. 182, sec. 8.

An affidavit was allowed to be used, after conviction, to prove proper notices to the Inspector of Inland Revenue, and to support the conviction.

The omission to endorse upon the notice of passing of the by-law the certificates under sec. 6 and sub-secs. of the Act of 1864, *Held*, immaterial, and that copies of such certificates were sufficient objection to the same not appearing to have been taken before the Police Magistrate, and although the by-law was then put in issue, objections to proof of the same were overruled on the ground that the objections were not urged before the Police Magistrate, and the defects pointed out, and that they were of a technical nature, and if taken might have been cured. ARMOUR, J., dissenting.

Held, also, ARMOUR, J., dissenting, that the statement of there being seven distinct offences and only one whole fine or penalty for the whole, and the omission to negative the exceptions in the enacting clauses, were not fatal to the conviction under the Temperance Act. The by-law being held to have been proved, and the form of conviction not being defective, *Held*, that the application to quash the conviction must fail.

September 9, 1878. *Watson* obtained a rule *nisi* from Galt, J., upon reading the writ of *certiorari* issued herein and the return made thereto, and the complaint, summons, and conviction of the above named defendant made herein on the 22nd July last, and the evidence taken upon the said complaint and summons, and the other papers and proceedings taken and returned with the said writ filed, calling upon Aaron Cox, the informant, and David George Halton, police magistrate for the Town of Peterborough, to shew cause why the conviction of the defendant, made on the 22nd of July, 1878, and the proceedings thereunder, if any, should not be quashed and set aside :—

(1.) On the ground that the said conviction was illegal, and contrary to the statute in such case made and provided, and was not supported by the evidence, the said by-law having been put in issue.

(2.) That the by-law under which the proceedings and conviction purported to have been taken and made was

not at the time of the said proceedings and conviction in force, and there was no authority for the said proceedings and conviction, inasmuch as it was enacted by the R. S. O., ch. 182, that notice of the passing of the said by-law should be given to the inspector of licenses, who had been substituted for the collector of inland revenue; and by the Statutes of Canada, in force at the time of the said conviction, it was enacted that this by-law whenever passed, should come into force and effect on the first day of March after notification thereof to the collector of inland revenue, for whom the inspector of licenses had been substituted as above-mentioned; and notice of the same was not given to the inspector of licenses till about the first day of June last past; and the statute of the Province of Ontario, whereby it was enacted that the said by-law, whenever passed, should come into force on the first day of May after passing, was *ultra vires* the Ontario Legislature, and the said conviction was therefore illegal and void.

(3.) That the said by-law was not properly or legally in force, inasmuch as the sixth section of the Temperance Act of 1864, which was the statute in force in this behalf, was imperative or mandatory, and the same had not been complied with, a copy of the certificate of the clerk having been delivered instead of the certificate itself, as required by said section of the statute.

(4) That said by-law was not properly or legally in force, inasmuch as it was shewn on the proceedings herein, that sub-section three of section six, of the statute last named, which was also imperative or mandatory, was not complied with, the double certificate prescribed by said subsection not having been delivered as therein required.

(5.) That there was not sufficient evidence of the legal existence of the said by-law, the same having been put in issue, inasmuch as the certificate of the clerk produced afforded insufficient evidence of the necessary publication of the said by-law, the date of polling being omitted therefrom, and it was not shewn how long previous to the said polling the said by-law was published.

(6.) That the said conviction set out and contained seven distinct offences, and imposed a fine or penalty of fifty dollars for the whole of said offences, whereas it was provided by the statute in that behalf that the penalty for each offence should not be less than \$20; and the said conviction was therefore illegal.

(7.) That the said conviction set out and contained seven distinct offences, and imposed one fine or penalty for the whole, whereas no provision was made for embodying more than one offence in one conviction; on the contrary, there should be a separate conviction for each offence.

(8.) That the said conviction was contrary to the statute, inasmuch as it omitted to negative the exceptions which were set out in the enacting clauses of said statute.

The facts appearing in the papers filed are sufficiently stated in the judgment.

December 3, 1878, *Christopher Robinson*, Q. C., shewed cause.

The by-law was properly in force, and technical objections as to the proof of the by-law will not prevail after conviction. The affidavit of the clerk produced shews that the collector of inland revenue was properly notified of the passing of the by-law, and that is sufficient. The Act of 1864 has been complied with, and the Acts of the Ontario Legislature may or may not be *ultra vires*. This question is involved in considerable doubt, and is not important to the decision of this case. The objections are all technical, and should have been urged before the police magistrate. *Certiorari* does not lie in this case. He referred to *Reid v. McWhinnie*, 27 U. C. 292, 293; *Wycott and Corporation of Ernestown*, 38 U. C. R. 533; *Lake and Corporation of Prince Edward*, 26 C. P. 173; *Regina v. Prittie*, 42 U. C. R. 612; *Re Lake and Blakeley*, 40 U. C. R. 102; *In re Watts and Emery*, 5 P. R. 267; *Regina v. Lerecque*, 30 U. C. R. 509; *Re Mace and The Corporation of the County of Frontenac*, 42 U. C. R. 70; *Regina v. White*, 21 C. P. 354; *Regina v. Lake*, 7 P. R. 215.

Watson contra. The by-law was put in issue upon the proceedings before the police magistrate, and it was not proved according to the statute. Sub-sections 2 and 3 of section 6 of the Act of 1864, prescribe certain certificates which must be endorsed upon the copy of the by-law communicated to the collector of inland revenue. The evidence of the by-law produced on the trial before the police magistrate shewed that these sub-sections had not been complied with, and copies of certificates only were endorsed on the copy of the by-law communicated. This section 6 and sub-sections were enacted as peremptory; the words used are "shall be endorsed," and a copy of the certificate prescribed in these words is not a compliance with the Act. The onus was upon the prosecutor to prove that the by-law was in force, and the evidence shews an imperfect compliance with the statute. If the statute was complied with only as shewn by the proof produced, it is upon its face insufficient to bring the by-law into force.

It was shewn before the police magistrate that the by-law was not communicated to the inspector of licenses as provided by sec. 8 of ch. 182 R. S. O., till the 1st of June, 1878, and by the Act of 1864 it is enacted that the by-law shall not come into force till the 1st March after notification; this by-law, therefore, could not come into force till the 1st of next March. The Statute of the Ontario Legislature changing the times at which the by-law shall come into force is a direct interference with the powers of the Dominion Parliament, as given by the B. N. A. Act.

The clerk of the municipality in endorsing a certificate on the copy of the by-law gave the particulars of the publication of the notice of polling. It would have been sufficient if he had certified due publication. He has not done that; on the other hand, he has given particulars of the publication, and these particulars shew an imperfect compliance with the statute in that respect. The prosecutor not only failed to prove publication, but he proved want of publication.

Although there is provision in the statute for embodying more than one offence in the same complaint or summons, that does not extend to the conviction; a conviction to be certain can contain only one offence, and the statute enacts that the penalty for each offence shall not be less than \$20. That is not inconsistent with the provision that two or more offences may be included in the same complaint, so that the whole penalty however shall not exceed \$100, and five offences might be included in the same complaint; but it is inconsistent with both sections to include seven offences in one conviction, and also to impose a fine only of \$50 for the whole seven.

The conviction does not negative the exceptions contained in the enacting clause of the statute, which has been held to be fatal.

The affidavit filed by the prosecutor should not be received by the Court, as this is in the nature of a criminal procedure, and the prosecutor cannot bolster up his case by new evidence for the purpose of upholding an unlawful conviction.

The right of *certiorari* does exist where there is absence of jurisdiction, as in this case, the by-law not having been proved to be legally in force, and where the conviction is defective in form.

He cited *In re Watts and Emery*, 5 Pr. R. 267; *O'Neill v. Corporation of Oxford*, 41 U. C. R. 170; *Re Mottashed and Prince Edward Co*, 30 U. C. R. 74; *Regina v. Osler*, 32 U. C. R. 324; *In re McCall*, 2 L. J. N. S. 16.

February 8, 1879. HAGARTY, C. J.—Section 36 of the Temperance Act of 1864 declares that “No conviction, judgment or order, in any such case, shall be removed by *certiorari* or otherwise into any of Her Majesty’s Superior Courts of Record; nor shall any appeal whatever be allowed from any such conviction, judgment or order, to any Court of General Quarter Sessions, or other Court whatever, when the conviction has been made by a stipendiary magistrate, recorder, Judge of the Sessions of the Peace, sheriff, or police magistrate.”

Section 37 declares that no by-law shall be set aside for any defect of procedure or form whatever, and (sub-sec. 2) nothing antecedent to the first publication of the notice under the by-law shall be cause of setting aside.

Section 16 enacts that if on the hearing the by-law be put in issue, the production of a copy certified under the hand of the clerk or secretary-treasurer of the municipality, and a certificate thereon, under the hand of the same officer, of the due publication, and communication to the collector of inland revenue, &c., shall be conclusive proof of the passing and tenor thereof, and also of such publication and communication thereof.

This by-law appears to have been voted on and carried in October, 1877. The clerk certifies under seal of the municipality that he did, on the 5th December, 1877, under section 6, cause a true copy of the requisition, on which was endorsed a true copy of the certificate of adoption, to be delivered to J. J. Hall, collector of inland revenue, and on 1st June, 1878, caused to be delivered a true copy of the said requisition, on which was endorsed a true copy of the certificate of adoption, to Aaron Cox, inspector of licenses.

It is objected to this that by the Act of 1864 the by-law must come into force on the 1st March after notification thereof, and no notice was given to the inspector of licenses till 1st June, 1878; referring to the Ontario Act, which provides for its coming into effect on the 1st May, as being *ultra vires*.

The Act of 1864 seems, at all events, to have been complied with, as notice was given in December, 1877, to the collector of inland revenue, prior equally to the 1st March and 1st May, on which the Act could come into force.

The Act of 1864, sec. 8, makes the period of coming into force the 1st March next after the day of communication.

The Ontario Act, Rev. Stat., ch. 182, sec. 10, simply provides that the Act shall come into force on 1st May next after the final passing thereof, section 8 having previously directed a communication to the inspector of licenses.

Both Acts seem to agree as to the form in which the

communications are to be made; viz., the copy so delivered shall have endorsed on it a certificate of the fact of approval by the electors.

It appears that here the clerk duly endorsed on the requisition containing the by-law a certificate under the corporate seal of the adoption thereof.

But it is objected that on the copy sent to the collector of inland revenue, as to the license inspector, there was endorsed, not an original certificate, as required by section 6 of the Act of 1864, but "a true copy of the certificate of adoption."

The certificate of adoption is on the original requisition, and true copies thereof were sent.

An affidavit was filed, produced on the argument, from the clerk of the municipality, in which he swears that he did, on the 6th December, 1877, deliver to the collector of inland revenue a true copy of the requisition for the by-law, certified by him, as town clerk, under his hand and the corporate seal of the municipality, and on the said copy so delivered there was endorsed a certificate under his hand of the fact of the adoption of the said by-law in the form B. 2, appended to the Temperance Act of 1864. The affidavit does not refer to the form of his certificate as to that fact returned to us on the *certiorari*. So that, in fact, the by law was duly delivered to the collector of inland revenue in December. The objection seems based on the form in which the certificate is stated on the copy produced at the hearing before the police magistrate.

The by-law was at the hearing put in issue. Section 16 of the Act of 1864 directs that, if put in issue, the production of a copy of such by-law, certified under the hand of the clerk, &c., and having thereon a certificate of the due publication and communication, &c., shall be conclusive proof.

There was produced a duly certified copy of the by-law (in the requisition), and there is also a proper certificate that the by-law had been duly adopted by the municipal electors in the terms of the Temperance Act of 1864.

This is endorsed on the by-law under date 31st October,

1837. The corporate seal is to it. But it is only a copy apparently of the original endorsement, though forming part of the matters certified under the signature of the clerk and the corporate seal for use at the hearing.

The objection taken in the rule is purely technical, and we cannot see that it was urged at the hearing before the police magistrate.

It is noted in the memorandum of the hearing returned to us that the by-law was put in issue, and that a certified copy of it was then put in; in fact it had been duly communicated to the collector, with the proper certificate enclosed.

All we see in this case are the papers returned to us on the *certiorari*. If this purely technical objection was not taken before the police magistrate, I don't think it should now be entertained.

I have carefully examined not only the papers returned to us on the *certiorari*, but also those filed on the application therefor. All I can find stated is in Mr. Scott's affidavit, on moving for the writ, that "on the trial I expressly put in issue the fact of any by-law under the Temperance Act of 1864 being in force at the time of the alleged offence," &c.: that, thereupon, certain papers were put in, and no other evidence whatever was given of such by-law.

The rule is drawn up upon reading the writ of *certiorari* issued herein, and the return made thereto, and the complaint, summons and conviction, and the evidence taken on said complaint and summons, and the other papers and proceedings taken and returned with the said writ now filed.

Strictly speaking, we are not called upon to see any paper or statement except what is returned to our writ; but even looking at all, we cannot see that the attention of the Court below was directly called to this point, as to the copy of the certificate instead of the original. If so objected, the error might have been corrected, or the case adjourned, to have enabled proof to have been given of the truth.

This objection may, in fact, have been actually made, but we do not see that it was, and I am of opinion that we should assume now that it was not.

Being purely technical it may well be disposed of on equally technical grounds. Where in truth and in fact the by-law was really in force, there was jurisdiction to convict. The defect now urged is in the mode of formal proof thereof.

I think it ought to be clearly shewn that the Court below was distinctly informed of the objection, which was curable, and that parties cannot lie by and on argument urge every technical objection that might have been urged below.

In this view the objection fails. Even if now open to the applicant, I would hesitate much before acceding to it, especially as I find that the same official who endorsed the original certificate of adoption on the by-law is the same who certifies that he sent a true copy of the certificate of adoption to the collector. If the official sent a true copy of adoption, which certificate was his own, and which he certifies was done "as required by section 6 of the said Act," it comes very near a compliance with the words of the Act, "there shall be endorsed upon the copy so delivered a certificate of the fact under the hand of the clerk."

I do not consider the non-communication to the inspector of licenses to be material. The Act of 1864 was sufficiently complied with.

The Act of Ontario, Rev. Stat., ch. 182, sec. 10, declares, the by-law shall come into force from 1st May next after the final passing, without any precedent communication to any official. This the applicant urges is *ultra vires*. In the same breath he argues that it was essential to the coming into force of the by-law that it be communicated to the inspector of licenses under section 8. It was, in fact, communicated to this inspector, but not till June, 1878. Therefore it stands thus. There was a proper communication in December, 1877, to the collector under the Dominion Act. If the Ontario Act be constitutional, the by-law came into

force from its final passing. Either way the objection seems to fail.

I think sub-section 3 of section 6 was sufficiently complied with by the certificate endorsed on the requisition containing the by-law.

I do not think it was necessary to state the date of the polling in the clerk's certificate. He states the publication to have been duly done according to the statute.

I have come to the conclusion that the by-law passed under the Act of 1864 was in force in the town of Peterborough, and that the defendant was convicted thereunder.

Having ascertained these facts, I think the application must fail, and that we should proceed no further on the *certiorari*. The utmost length to which the applicant can ask us to go must be, I think, to ascertain that the conviction was made under the Temperance Act.

Section 36, already cited, takes away the *certiorari*, and this being matter of criminal procedure, I do not think any argument can be drawn from any expressions in the Ontario Act to prevent its operation.

The other objections need not be discussed in this view.

The statement of there being seven distinct offences, and only one whole fine or penalty of \$50 for the whole, and the omission to negative the exceptions in the enacting clauses, are not fatal to a conviction under this Act on this application. In fact, section 17 allows the joinder of several offences, so as the maximum of penalty do not exceed \$100.

We cannot, I think, entertain the last mentioned objection, though it has been held fatal in many cases where the conviction can be properly scrutinized by the Court. The conviction brought before us professes to be made under the Temperance Act of 1864. It appears, as a matter of fact, we think, that Act was in force, and that the conviction was made under it, and, in my opinion, the applicant cannot succeed in quashing it.

ARMOUR, J. delivered an oral judgment dissenting from the conclusion arrived at, on the ground that there was not sufficient legal proof of the by-law, or of its being in force, to warrant the conviction.

CAMERON, J., agreed with Hagarty, C. J.

Rule discharged.

MARY ARMSTRONG, ARCHIBALD LITTLE, AND JAMES
ROBINSON, EXECUTORS, V. ROBERT G. ARMSTRONG.

Executor de son tort—Administrator.

An action will not lie against one as executor *de son tort*, where there is a legally appointed administrator, even though the latter may have conveyed the estate to the former on condition of his paying the debts of the deceased.

THE declaration was on the common counts for money payable by the defendant, as executor of Thomas R. Armstrong, to the plaintiffs, as executors of Robert Armstrong, for goods bargained and sold, &c., &c.

Pleas: 1. Never indebted. 1. Denial of executorship of defendant. 3. Denial of executorship of plaintiffs.

Issue.

The case was tried at the last Summer Assizes at Toronto, before Cameron, J., without a jury.

Application was made by defendant to withdraw his first and third pleas, which was granted.

It appeared in evidence that William Armstrong, being the owner of a farm of about three hundred acres, in the township of Markham, in which he resided, leased it to his son, Thomas R. Armstrong, in the fall of 1874, for a term of five years, at a yearly rental of fifty dollars: that Thomas R. Armstrong set out for England in the latter end of May, 1875: that at the time he set out all the grain

was sown on the farm, except on some three or four acres, and he had on the farm a large amount of personal property, said to be worth about \$4,000, consisting of horses, cows, sheep, and farming implements. When he went away he left everything under the care of one Ricketts, his hired man, and at that time his father and he, and his brother, the defendant, who was then practising as a veterinary surgeon, were all living together in the house on the farm. The father was unable, from age and infirmities, to do any work. Thomas R. Armstrong sailed by the City of Vicksburg for Liverpool, and was lost at sea about the second of June, 1875. After tidings came that he was lost, the defendant took possession of everything that was on the place, and told the hired man that "he would look after the thing himself," and that he (the hired man) could go to work on the farm for the balance of the year.

On the sixth of August, 1875, letters of administration of the personal estate and effects of the deceased were granted to William Armstrong, the father of the deceased, and on the fifth of September, 1875, the following notice appeared in the Markham *Economist*, a newspaper published in the township where this farm was situated:

" TAKE NOTICE.

" The undersigned is prepared to pay all debts of the late Thomas R. Armstrong. All accounts, &c., owing to the said Thomas R. Armstrong are payable to

" R. G. ARMSTRONG,

" *Acting for Administrator.*

" Markham, Sept. 5th, 1879."

It appeared that the administrator, William Armstrong, did not *personally* act in the administration, but only through the defendant, as his agent, and on the 13th of November, 1875, the following agreement was made between William Armstrong, the administrator, and the defendant:

" This agreement, made this thirteenth day of November, eighteen hundred and seventy-five, between William Arm-

strong, Sr., of the township of Markham, in the county of York, and Province of Ontario, Yeoman, of the first part, and Robert Goodfellow Armstrong, of the township of Markham, in the county and province aforesaid, Yeoman, of the second part, witnesseth, that the said party of the first part, heir of the late Thomas Reesor Armstrong, deceased, for and in consideration of the payment of the debts and accounts of the said Thomas Reesor Armstrong, except two notes of five hundred dollars each, given by T. R. Armstrong to Annie German, gives to the said party of the second part all the personal property of the said Thomas Reesor Armstrong, including horses, cattle, sheep, with other animals, farm implements, notes, and accounts, that was owned by the late Thomas Reesor Armstrong, and also all personal property to which I am now entitled.

Signed and sealed in presence of P. REESOR. }	<div style="display: inline-block; text-align: center; vertical-align: middle;"> ^{his} X _{mark.} </div> " WILLIAM ARMSTRONG, [L.S.] " R. G. ARMSTRONG." [L.S.]
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The defendant continued to manage the farm from the death of Thomas down to the time of the trial. He sold the crops that Thomas sowed, and several of the horses and other cattle that had belonged to Thomas: he paid Thomas's hired man for that portion of the year of his employment that had expired up to Thomas's death, and for that portion that continued afterwards: he collected moneys due to Thomas, and paid some of his debts. Thomas owed a considerable amount.

The administrator, William Armstrong, died on the 10th day of November, 1878, and after his death the defendant received money, part of the proceeds of the sale of some property that had belonged to Thomas.

This action was commenced on the 30th day of October, 1878, for a cause of action which had accrued in the beginning of November, 1872, and was commenced against the defendant, as administrator of the personal estate of Thomas, and was so commenced because, upon the plaintiff's attorney asking the defendant if he was such administrator,

he answered that he was, and when the plaintiff's attorney found out that that this information was untrue, the cause of action sued for was barred by the statute, and he then got the proceedings amended, charging the defendant as executor of Thomas.

The learned Judge found for the defendant, on the ground that he was not an executor of his own wrong.

He also found that the plaintiff's testator, Robert Armstrong, knew that William Armstrong was the administrator.

He also found that the plaintiffs, James Robinson and Mary Robinson had notice that William Armstrong, and not defendant, was administrator, and that the amount due to the plaintiffs, if entitled to recover, was \$244.

August 26th, 1879. *Malone* obtained a rule *nisi* from Armour, J., sitting alone, to enter a verdict for the plaintiff, or for a new trial, on the law and evidence, defendant having, by intermeddling with the estate, made himself liable as executor *de son tort*.

November, 25th, 1879. *Delamere* shewed cause. The evidence takes the case out of the operation of the Statute 43 Elizabeth. It is clear that in answer to evidence adduced to prove a defendant executor *de son tort*, he may shew that he acted under the authority of the rightful executor: *Sykes v. Sykes*, L. R. 5 C. P. 113, and cases there cited; and the same is true where he acts under the authority even of a person to whom letters of administration were afterwards granted: *Hill v. Curtis*, L. R. 1 Eq. 90. The furthest any case goes is, to show that where a party intermeddles and claims to do so *qua executor*, he may be treated as executor *de son tort*; but even that position is denied by Lord Kenyon in *Hall v. Elliott*, Peake 87.

Ritchie, contra. It is clear that where a party retains property after the appointment of an administrator, he is liable: *Priest v. Priest*, 2 T. R. 97; *Curtis v. Vernon*, 3 T. R. 587; *Read's Case*, 5 Co. 33; *Williams Executors*, 8th

ed. 263, 265; *Anon.* Salk. 312, 315. Defendant having taken an assignment from the administrator of all the estate of deceased, without giving a valuable consideration therefor, is liable under 43 Eliz. as executor *de son tort*.

December 27th, 1879. HAGARTY, C. J.—The deceased, Thomas R. Armstrong, died on the 2nd of June, 1875. Administration was granted to his father, William Armstrong, in August of the same year.

Between his death and the grant, William and his son the defendant, might probably have been sued as executors *de son tort*. No suit however was brought.

Lord Hatherley, (then Sir W. P. Wood,) in *Hill v. Curtis*, L. R. 1 Eq. 90, very fully discusses the law. He speaks, at p. 100, of *Sharland v. Mildon*, 5 Hare 469: "The case of *Sharland v. Mildon* shews that if before administration is taken out an agent is employed, the agency is not lawful so long as the employer is wrong-doer. But if the employer becomes administratrix, then all she has done is made right, and all that her agent has done is made right also."

Sykes v. Sykes, L. R. 5 C. P. 115, may be also referred to, In a note the facts in *Sharland v. Mildon* are more correctly stated than in 5 Hare.

Then, from August, 1875, down to 10th of November, 1878, and after the bringing of this suit, William Armstrong, the administrator, was undoubtedly the proper person for any creditor of the intestate to sue.

The fact of his having made a deed to the present defendant of the estate, in consideration of his paying the debts, could be no defence whatever to the administrator.

I cannot understand how, when this action was commenced, it was possible to sue this defendant as executor *de son tort*. It seems to have been wholly a mistake.

We are not discussing, nor are we called on to discuss, whether the defendant made any false representation to the plaintiff for which he is liable.

A statement by him that he was administrator would hardly make him so; the only result would be that they in

mistake would sue him as administrator. But here they sue him on a totally different ground, viz., that he is executor *de son tort*.

I do not think that any authority is to be found warranting a suit against a man as executor *de son tort*, while a lawful administrator is living and fully within reach of process.

There is nothing in the evidence to bring the case within the Statute of Elizabeth. The object of that Act is fully explained in the preamble.

The statute may be found in 1 Wms. Exors. 263, ed. 1878, and the general subject is fully discussed.

It will be seen that it is apparently impossible to reconcile all the dicta of text writers from Godolphin downwards, and the authorities themselves. See especially at p. 265 as to there being at the same time a rightful and wrongful executor.

The language of the Master of the Rolls, in *Tomlin v. Beck*, 1 T. & R. 438, is very strong against some of the older dicta. Even the alleged intermeddling was at a time subsequent to the death of the real executor.

Sir R. Malins, *In re Lovett*, L. R. 3 Chy. D. 200, overruled a demurrer by the defendants, against whom an injunction was prayed; the other defendants were executors in Australia, but had not yet proved the will. The demurring defendants were English solicitors, who had received moneys of the testator. He thought it reasonable to seek to prevent them from parting with the portion of the estate in their hands except under the direction of the Court.

In the present case there is no suggestion of fraud, or of any inability of the proper parties, or their legal representatives, to make good any legal demand.

If any difficulty arise from the lapse of time we may regret it, but cannot alter our view of what is the law.

I think the verdict for the defendant must stand.

CAMERON, J., concurred.

ARMOUR, J.—The question, whether or not the defendant so intermeddled with the personal estate of his deceased brother as to constitute him an executor *de son tort*, is a conclusion of law to be deduced from the facts established upon the trial of this cause.

If the proper conclusion of law to be deduced from these facts is, that he has intermeddled in such a way as to make him an executor *de son tort*, then he is liable in this action, for he has pleaded no plea under which he can be relieved from the consequences of having so acted.

Very slight acts of intermeddling with the goods of a deceased person, when there is no legal personal representative, will make the person so intermeddling an executor *de son tort*.

Milking the cows, even by the widow of the deceased, the taking of a bible, of a bedstead, of a dog, the killing of cattle, the using, the giving away or selling any of the goods, the entering upon land leased to the deceased and taking possession, claiming the particular estate, are all cited as acts, each of which has been held sufficient to make the person who did it an executor *de son tort*.

In this case the defendant, as soon as he heard of his brother having been lost at sea, took possession and control of the farm, and of everything that was on it, and managed and continued his brother's business, without any legal authority so to do; at all events, until letters of administration were granted to his father, a period of nearly two months, at a season of the year when the business of the farm would be in full operation.

If this suit had been brought the day before the letters of administration were issued, that is, upon the fifth of August, 1875, against the defendant, charging him as executor, and he had pleaded *ne unques* executor, the acts of intermeddling above set out and proved at the trial, would have well warranted a finding against him upon that issue; and the fact that this action was not brought till the 30th of October, 1878, can make no difference in the effect of those acts upon the same issue.

But it is suggested that the defendant upon the appointment of the administrator accounted to him for these acts, and paid or handed over the property to him.

I find, however, no evidence that he did so, nor has the defendant pleaded any plea under which he could show that he had done so.

It is also said that from the time of the intestate's death to that of the appointment of his father, the administrator, the defendant acted in what he did as the agent of his father, and that the subsequent grant of letters of administration to his father had the effect of making the defendant's acts which were theretofore wrongful rightful from the beginning, and that the letters of administration had relation back to the death of the intestate.

There is no evidence before us from which the inference can be fairly drawn that prior to the granting of the letters of administration the defendant acted in what he did as the agent of his father.

Assuming, however, that he did, the effect of that was to make them both executors of their own wrong, and liable to be sued as such.

The authority of an executor is derived from the testator, and therefore letters of probate when granted have relation back to the death of the testator. The administrator, on the other hand, derives his authority from the Surrogate Court, and the letters of administration have no backward relation nor any retro-active effect whatever.

So it has been held that if letters of administration have been granted to one who has by his intermeddling with the goods of the deceased made himself executor *de son tort*, a creditor of the deceased may at his option sue such an one either as executor *de son tort* or as administrator.

There is no evidence whatever that the father, after he obtained the letters of administration, ever ratified or adopted what the defendant had previously done, and whatever effect the granting of the letters of administration to the father may have had upon what the defendant had previously done as his agent, as between themselves, no

case has yet gone the length of determining that, as against strangers, creditors of the intestate, the subsequent grant of letters of administration to the principal has the effect of depriving them of their remedies against the agent as executor *de son tort*, and of converting by relation his wrongful acts into rightful ones.

I have used the terms principal and agent for convenience: they are however legally inappropriate as a designation of two wrongdoers.

I am, moreover, of opinion that the transaction between the administrator and the defendant, evidenced by the instrument of November 13th, 1875, made the defendant an executor *de son tort* within the plain words of the enactment of 43 Eliz., ch. 8.

It has been sometimes said that there cannot be a rightful executor and an executor *de son tort* at the same time. What is meant by that is, that after letters of probate are granted to an executor, no person can, by intermeddling with the goods of the testator, become an executor *de son tort*; but, in the face of the statute of Elizabeth, it would be difficult to affirm that there cannot be a rightful administrator and an executor *de son tort* at the same time.

In my opinion the rule should be absolute to enter the verdict for the plaintiffs for \$244, the sum assessed by the learned Judge; but, as the Chief Justice and my brother Cameron take a different view of the law, I think we ought, at least, to accede to the request of the plaintiff's counsel and allow the plaintiffs to amend, by declaring on the instrument of November 13th, 1875, and that, in order to enable them to do so, we ought, if necessary, to grant a new trial, imposing such terms as to costs as may be reasonable, and if need be to transfer the cause to the Court of Chancery.

The plaintiffs have a just claim for the sum of \$244; it was proved at the trial and admitted by the defendant; the defendant has agreed by this instrument to pay it, and he is the only person, now that the administrator is dead, against whom the plaintiffs can claim it.

That they can recover it against the defendant the case

of *Mulholland v. Merriam*, 19 Grant 288, and the cases collected in the U. C. L. J., vol. 16, p. 2, prove.

The plaintiffs cannot bring another action, for their claim is now barred by the Statute of Limitations.

The proposed amendment is certainly "for the advancement of justice and the prevention and redress of fraud," and the case of *Peterkin v. Macfarlane*, 4 App. R. 25, shews it to be our imperative duty to make it.

The Chief Justice and my brother Cameron, however, do not agree to allow it.

Rule discharged.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—

JAMES CULLEN LILLIE, WILLIAM JOHN FRANKS, JAMES WILLIAM HOLMES, JOHN SANDFIELD MACDONALD, GERARD HOLMES HOPKINS, WILLIAM JOSEPH DELANEY, WILLIAM MCKAY READE.

SITTINGS IN VACATION

AFTER MICHAELMAS TERM.

IN RE THE HAMILTON AND NORTH WESTERN RAILWAY COMPANY AND BOYS.

Railway arbitration—Appeal against award—Refusal to interfere—Practice
—R. S. O. ch. 165, secs. 19, 20.

The most proper and convenient mode of appealing against an award under "The Railway Act of Ontario," R. S. O. ch. 165, secs. 19 & 20, is by rule *nisi*, upon reading the evidence taken by the arbitrators and transmitted by them under sub-sec. 12.

The Court will not interfere with such award upon the merits unless it is clearly wrong, and where there was no imputation against the arbitrators, who had examined the property, and seen and heard the witnesses, whose evidence as to the value of the land was extremely contradictory,

OSLER, J., refused to interfere, on the ground that the sum given was too small.

May 27, 1879. *Creelman* obtained from Osler, J., sitting alone, a rule *nisi*, on behalf of the owner of certain lands in the town of Collingwood, which had been taken by the Hamilton and North Western Railway Co. for the purposes of their railway, calling upon the company to shew cause why the award of the arbitrators appointed to ascertain the sum to be paid as the compensation for the lands so taken should not be set aside, on the ground that the award was against evidence and the weight of evidence, or why the amount of the award should not be increased on the evidence, and pursuant to the provisions of the Railway Act, to the sum of \$3,500, or such other sum as a Judge should deem proper.

It appeared that Mr. Boys was the owner of thirteen town lots on Walnut street, in the town of Collingwood, which the railway company required for the purposes of their railway. They offered him \$1,427.50 as compensation. He refused to accept this sum, and the matter was referred to three arbitrators, pursuant to the Railway Act, R. S. O. ch. 165 sec. 20. An award was made by two of them, (the arbitrator appointed by the owner dissenting,) by which the amount to be paid as compensation was fixed at \$1,400. Against this award the present application was made.

June 24, 1879. *Ferguson*, Q. C., and *Moberly*, shewed cause.

Pepler, contra. Although the decision of arbitrators on questions of fact is entitled to great weight, yet where, as is the fact in this case, the evidence is so overwhelmingly in appellant's favour, the Court will not allow the award to stand. The respondents will, no doubt, rely on *Norval v. The Canada Southern R. W. Co.*, 41 U.C. R. 195, to support the opinion of the arbitrators even against the evidence; but that case is clearly distinguishable, in that the arbitrators in that case had a personal knowledge of the land in question, value, &c., which element is absent in this case.

August 22, 1879. OSLER, J.—As regards that branch of the rule which seeks relief on the ground that the award was against law and evidence, Mr. Ferguson took the preliminary objection that the application was not regular in form, and that so far as it was an appeal against the award it could not be entertained by way of rule *nisi*.

The statute under which the appeal from a railway arbitration is given is R. S. O. ch. 165. Subsecs. 12, 19, and 20, of sec. 20 are material.

Subsection 12 enacts that the depositions of witnesses examined before the arbitrators shall be taken down in writing, and shall, together with the exhibits, be delivered or transmitted by the arbitrators, forthwith after

making their award, to the Clerk of the Records and Writs of the Court of Chancery, and shall be filed by the clerk with the records of the Court. It is to be observed that no provision has been made for the transfer of the evidence, &c., from the office of the Clerk of the Records and Writs, when it is desired to appeal to a Judge of one of the Superior Courts of Law.

Subsection 19, enacts that any party to such arbitration may, within one month after receiving a written notice of the award, appeal therefrom upon any question of law or fact to a Judge of one of the Superior Courts of Law or Equity, and upon the hearing of such appeal the Judge shall, if the same is a question of fact, decide the same upon the evidence as in a case of original jurisdiction.

Section 20 enacts that upon any such appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from the decision of the Judge of a County Court under the "County Courts Act," subject to any general rules or orders altering and repealing such practice and proceedings.

No general rules and orders have been made by the Superior Courts under this subsection, and at the time it was consolidated in its present shape in the Revised Statutes the appeal from the decision of the Judge of the County Court had been transferred from the Superior Courts to the Court of Appeal.

Whether this fact was overlooked, or whether the framers of the section intended to regulate the practice in such an appeal as the present by the practice of another Court, as has been done in the case of an appeal in other cases of arbitration, where the practice on an appeal from the Master's report in Chancery is imported into the Courts of Common Law, is not easy to determine. The steps to be taken on an appeal to the Court of Appeal, R. S. O. ch. 43 secs. 37 to 42, are: 1. To give security in such sum as the Judge of the Court appealed from may direct. If by bond, the bond to be filed in the Court appealed from, if by deposit of a sum of money, such sum to remain in

such Court. 2. On security being given the Judge certifies to the Court of Appeal all the proceedings in the cause before him. 3. The appeal is then set down for argument at the next sittings of the Court of Appeal.

It is not easy to apply any of this practice to such an appeal as the one now before me, and I think that an appeal by way of rule *nisi*, according to the well known practice of the Court, upon reading the evidence taken by the arbitrators, and transmitted by them to the Clerk of the Records and Writs of the Court of Chancery, corresponds *as nearly as may be under the circumstances* to the practice on an appeal to the Court of Appeal from the decision of the Judge of the County Court.

I am not aware that the point has hitherto been expressly decided. It is alluded to in *Re Grand Junction R. W. Co. and Masson*, 44 U. C. R. 203, but within my own knowledge these appeals have been presented by petition, notice of motion and rule *nisi*, indifferently. I think the latter is the proper as well as the most convenient mode to be adopted.

There remains then the question whether I should allow the appeal on the merits. I feel great difficulty in doing so.

The question as to the value of the land is in the nature of a question of fact, though depending upon belief or opinion, and the statute requires me to decide the same upon the evidence as in a case of original jurisdiction.

I must nevertheless be guided by the principle which applies to every proceeding in the nature of an appeal viz., that the decision appealed from should not be interfered with unless it is clearly wrong.

In *Canada Southern R. W. Co. and Norval*, 41 U. C. R. 195, Harrison, C. J., in dealing with an award made under this section, at p. 202, said : "It does not appear to me that the Legislature intended the Judge to whom the appeal is made to be a substitute for the arbitrators, or to permit him to reverse their finding as to damages upon a mere question of the weight of evidence. If, however, it were made to appear from the amount of damages, as compared

with the evidence adduced before the arbitrators, that the arbitrators must have acted under the influence of undue motives, or some gross error or misconception, the Judge might, as in the ordinary case on a motion against a verdict for excessive damages, set aside the finding." Again, at p. 203: "If * * * it appear that there was legal misconduct proceeding from the disregard of some legal principle made for their guidance, the Judge no doubt might set aside the award."

Mr. Pepler admitted that I was bound by the authority of this case as to the construction to be placed upon the statute, but contended that the award, when compared with the evidence, was such as to shew misconduct and partiality, and that the sum awarded was outrageously less than the fair value of the land.

The parties agreed that the same number of witnesses should be examined on each side, and a mass of evidence was taken. I have had the advantage of hearing a careful analysis of it upon the argument, and have since then attentively perused it. Ten witnesses, all well-known residents of the town or vicinity, valued the lots on behalf of the owner at sums ranging between \$400 and \$200. Indeed, one witness considered that the corner lots, owing to the erection of station-houses, were worth \$1000 each.

On the other hand, a number of equally well-known residents, called on behalf of the company, valued the lots at prices varying from \$75 to \$125, or, in a block, from \$975 to \$1545. [The learned Judge here set out the evidence of several of the witnesses on either side, and then continued :]—I do not intend, however, to go through the whole of the evidence. I have referred to so much of it as is necessary to shew that there was in fact evidence which, if the arbitrators chose to accept it, would warrant their award, notwithstanding the fact that a higher value is placed upon the land by a greater number of witnesses.

I should not, however, be justified in setting aside or altering the award for a difference of \$200 or \$300, or even a much larger sum. The arbitrators have seen and

heard the witnesses; they have examined the property, and considered whether any allowance should be made for the natural disadvantages which some of the witnesses speak of, or for any other reason. Giving them credit for acting with honesty and impartiality, they were in a better position than I can possibly be, in view of the extremely contradictory character of the testimony, to form a correct opinion of the value of the land in question.

The rule must therefore be discharged, and I see no reason for refusing the company their costs.

Rule discharged, with costs.

IN RE COLQUHOUN AND THE TOWN OF BERLIN.

Property abutting on highway—Raising and lowering of highway—Compensation—R. S. O. ch. 174, secs. 383-456—Conflicting evidence—Interference with award

Upon a reference under the Municipal Act, R. S. O. ch. 174, to determine the compensation to which the applicant was entitled for raising and lowering a street in a town in front of his land:

- Held*, 1. That the omission of the written statement required by sec. 383 of the Act to be put in by arbitrators, is not necessarily a ground for setting aside their award, and it may be afterwards supplied.
2. That the award should not be set aside for not dealing with the question of compensation for injuries sustained by the *lowering* as well as raising the street, the evidence being hardly directed to this at all, and no appreciable damage clearly shewn; and if necessary, the Court would, under sec. 383, amend the award in this respect.
3. That it is competent for arbitrators in such a case to find that no damage has been sustained, and they are not bound to award some or merely nominal damages.

The distinction between arbitrations under our Municipal and Railway Acts and the English Lands Clauses Consolidation Act pointed out, and remarks as to the right to enforce such awards summarily.

Where the evidence is conflicting as to whether damage or benefit has resulted to the party affected, the Court will not interfere with an award, merely because it may think the weight of evidence to be against the view taken by the arbitrators.

On the 29th of August, 1879, *Robertson*, Q. C., obtained from *Armour*, J., sitting for the full Court, a rule *nisi* to set aside the award on the following grounds: 1. That

the arbitrators exceeded their authority, and acted contrary to law, in awarding that the claimant was not entitled to compensation in consequence of the exercise by the corporation of their powers in raising a certain highway in the town of Berlin, they having no power to enquire into the right which the claimant had to compensation, but being bound to assess compensation on the assumption that the right to it existed, and that the claimant's lands had been injuriously affected.

2. That the evidence shewed that the claimant's lands had been injuriously affected, in consequence of the corporation exercising its powers, beyond any advantage which the claimant derived from the work, and in that respect the award was against evidence, and should have been in favour of the claimant for substantial compensation. 3. That the award was defective in not having dealt with the questions so far as compensation was claimed for lowering a portion of the road, and therefore did not decide upon the whole of the matters in difference. 4. The arbitrators having proceeded partly on a view of the premises, did not put in writing a statement thereof sufficiently full to allow the Court to form a judgment of the weight which should be attached thereto.

The award in question was made under the 373rd and following sections of the Municipal Act, R. S. O. ch. 174.

It appeared that the applicant was the owner of a block of lots in the town of Berlin, one range of which fronted on Mary street, and another on King street. The corporation, in order to improve King street, passed a by-law for the purpose of raising it in some places and lowering in others, and in executing the works under this by-law, the level of King street was raised along the whole frontage of the applicant's lots on that street to an average height of five feet, and the road was made somewhat narrower than before. The effect of this work was, to deprive the applicant of all access to both ranges of lots from King street; and it was contended that the lowering of another part of the street had the effect of diverting more water upon the property than it had formerly received.

The applicant claimed that his lands had been injuriously affected by these acts of the corporation, and arbitrators were appointed under the statute to determine the compensation to which he was entitled. Having examined a number of witnesses and viewed the property they joined in an award, the material portion of which, omitting recitals, was as follows: "The said Frederick Colquhoun is not entitled to compensation from the said corporation of the town of Berlin, in consequence of the exercise of its powers in raising the said public highway in front of the lands of the claimant, the said lands not having been injuriously affected thereby."

It appeared that the arbitrator appointed by the applicant did not agree with the finding, and only consented to sign the award and so make it unanimous by way of compromising the costs of the arbitration, of which the parties were respectively directed to bear their own, and to pay one-half of the arbitrators' fees.

The following statement, signed by all the arbitrators, appears at the conclusion of the evidence: "The arbitrators made a personal inspection of the premises alleged to be damaged, and viewed the same both before and after hearing the oral testimony of the witnesses. They went over the property and viewed for themselves the elevation of the road above its original height before the improvements were made, and also the lay of the land, and the condition and value of the soil, and the wash and natural run of the water."

October 3rd, 1879. *Alexander Miller*, of Berlin, shewed cause. The act of the corporation having been lawful, performed within their powers and under the authority of a by-law, no action would lie, and the claimant's remedy was solely under the arbitration clauses of the Municipal Act R. S. O., ch. 174, secs. 367 to 385 inclusive: *Harrison's Municipal Manual*, 3rd ed., p. 373, and cases there cited. The corporation were obliged to submit to arbitration, and in their by-law appointing an arbitrator expressly denied

that the work had injured claimant's property. By their submitting to the arbitration, no admission of liability can therefore be assumed as against them. The award of the arbitrators was unanimous, and fully sustained by the evidence, the weight of which was strongly against claimant. The claim for damages by the *raising* of the street was the substantial grievance, and the damage by *cutting down* a part of the street was not sustained by the evidence, and was not seriously urged before the arbitrators. If necessary the Court may amend the award : *St. George's Parish v. King*, 2 S. C. 157. The certificate of the arbitrators, under sec. 383 of the Municipal Act is as full as could be under the circumstances ; but even if not, the award will not necessarily be set aside : *Northumberland and Durham v. Cobourg*, 20 U. C. R. 283. No well founded claim existed, the claimant not having been deprived of any right, nor any right appreciably affected, which he was by law entitled to make use of in connection with his property. He would have had no right of action even if the work had not been done by authority of an Act of Parliament, and so the case is not within the rule laid down in the cases referred to in *Re Yeomans and the County of Wellington*, 43 U. C. R. 533.

Robertson, Q. C., contra.

The argument of the learned counsel, and the cases cited by him, are set out in the judgment.

January 13th, 1880. OSLER, J.—The 456th section of the Municipal Act, R. S. O. ch. 174, enacts that every council shall make to the owners or occupiers of, or other persons interested in, real property * * injuriously affected by the exercise of the powers of the corporation, due compensation for any damages necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work ; and that every claim for compensation, if not mutually agreed upon, shall be determined by arbitration under the Act.

And, as regards the award, section 383 of the same Act provides that, in case the arbitrators proceed partly on a view of the property, or any knowledge or skill possessed by them, they shall put in writing a statement thereof, sufficiently full to allow the Court to form a judgment of the weight which should be attached thereto.

And section 385 provides that every award shall be subject to the jurisdiction of any of the Superior Courts of Law or Equity, as if made on a submission by bond containing an agreement for making the submission a Rule of Court; and that in cases within the 383rd section, viz., awards which do not require adoption by the council, the Court shall consider not only the legality of the award, but the merits as they appear from the evidence, documents, and statements filed, and may call for additional evidence to be taken in any manner the Court directs, and may either, without taking such evidence, or after taking it, set aside the award, or remit the matters referred to the reconsideration of the same or any other arbitrators, as provided by the Common Law Procedure Act, or the Court may itself increase or diminish the amount awarded, or otherwise modify the award, as the justice of the case may require.

The last objection taken by the rule *nisi* is not borne out by the facts, for the arbitrators have put in writing, at the end of the evidence, a very full statement of the view which they took of the property in question, quite sufficient, in my opinion, to satisfy the requirements of the Act in this respect. It was not, however, referred to on the argument, and I desired to be furnished with such a statement from the arbitrators. Its omission is not necessarily a ground for setting aside the award: *Re The Arbitration between Northumberland and Durham and Cobourg*, 20 U. C. R. 283. There appears to have been some misapprehension as to what I required, for I have received a statement, not so much of the view which the arbitrators had of the property, as of their own personal views and opinions upon the questions in dispute.

The third objection, namely, that the award is defective for not dealing with the question of compensation for injuries sustained by the lowering of the road, may be technically correct; but I would not set aside the award on that ground alone, for upon the evidence it is difficult to see that any appreciable damage has been caused thereby; indeed, the evidence can hardly be said to have been directed to this head of damage at all. If necessary, I would amend the award in this respect, as the 383rd section enables me to do.

The first objection to the award also fails. On the face of the award the arbitrators only find that the property of the claimant has not been injuriously affected by the act complained of. There is no doubt that since the Municipal Institutions Act of 1873, the act of the corporation in raising or lowering the level of the street, so as to deprive the owner of access to his property from such street, may give rise to a claim for compensation to the extent by which the property is injuriously affected by the exercise of the powers of the corporation. If the property is injuriously affected, the right to compensation cannot be denied: *Re Yeomans and The Corporation of the County of Wellington*, 43 U. C. R. 522, affirmed in Appeal, 4 App R. 301.

It was, however, strenuously urged that an arbitration under the Municipal Act, as to the amount to be paid for compensation, was analogous to an arbitration on, or assessment of, damages under the Imperial Lands Clauses Consolidation Act, sec. 68, for lands taken or injuriously affected by railway or other companies: that the only question to be determined was the amount of the damage, the existence of some damage being necessarily assumed; and that the arbitrators could not find that no damage had been sustained, but were bound to award something, leaving the claimant to establish his title to it in an action on the award. Mr. *Robertson* relied upon the cases of *Regina v. London and N. W. R. W.*, 3 E. & B. 443; *Read v. Victoria Station R. W. Co.*, 1 H. & C. 826; *Barber v. Nottingham R. W. Co.*, 15 C. B. N. S. 726, as establishing his contention in this respect.

The proceedings under the Ontario Railway and Municipal Acts are, however, essentially different from those under the English Act. In the latter no provision is made for trying, on the arbitration or assessment, the right or title of the party claiming compensation, or whether the acts complained of are such as, in point of law, can give rise to a claim for compensation, while the former provide for an appeal on which all questions of law and fact may be reviewed by the Court, and the legality of the award and the merits of the case considered.

The point was incidentally referred to in *Widder v. Buffalo and Lake Huron R. W. Co.*, 29 U. C. R. 154, in which leave was refused to the defendants to add a plea that the land was not injuriously affected. Wilson, J., observed that there was a wide difference in proceedings on arbitrations under the English Acts and those which were taken under our own Statutes. Since that case was decided the right of appeal against awards under the Ontario Railway Acts has been given, making the difference still more marked.

I do not at all agree with the contention that such an award under the Municipal Act can only be enforced by action on the award. It is, by section 385, plainly made subject to the jurisdiction of the Court as an award under the Statute of Wm. III. It may be found that awards under the Railway Acts or, at all events, under the Railway Act of Ontario, can also now be summarily enforced. See *Great Western R. W. Co. v. Warner*, 19 Gr. 506; *Rhodes v. The Airedale Commissioners*, L. R. 1 C. P. D. 402, C. A.

But it is not necessary to discuss this question further; for whether we are to be guided by the English decisions or not, it is clear that the arbitrators may find that no damage has been sustained, and they are not bound to award some or merely nominal damages. The cases of *Regina v. Lancaster and Preston R. W. Co.*, 6 Q. B. 759; *Re Bradby v. Southampton R. W. Co.*, 4 E. & B. 1014, and *Re Northumberland v. Cobourg*, 20 U. C. R. 283, are in

point, and the same result follows from the language of the 456th section above quoted, for the only damages the claimant is entitled to are those which are beyond any advantage which he may derive from the work.

The second objection remains to be considered.

On the evidence the case presents itself in this way. By raising the road a bank or wall of earth of an average height of five feet has been erected along the whole King street frontage of the claimant's property. The effect of this is (1) to cut off all access to the property by that road, making it necessary to construct proper approaches, &c. (2) To render the King street lots unavailable for building purposes without filling them up, or nearly so, to a level with the road; and (3) to make the property, to some extent, more difficult to drain.

On both sides the evidence was, to a great extent, directed to the augmentation or depreciation of the value of the property for building purposes, and as is usually the case the opinions of the witnesses differed very widely. The slope or incline of the lots was from Mary street to King street, and those fronting on King street were rather low and wet. Some of the claimant's witnesses stated that the property was depreciated, as a whole, to the extent of one-third, or \$800 or \$900, or \$1,000, the Mary street lots being less valuable, because they could no longer be sold with the King street lots, so as to give the purchaser a double frontage; other witnesses estimated the damage to the rear or King street lots at \$500 or \$350. Another said that each of them was injured to the extent of \$150; another that their value as building lots was nearly destroyed, as they would have to be filled up on an average four feet, while in the opinion of another the property had decreased in value to the amount it would cost to fill it up to the level of the road.

On the other hand, twenty-one witnesses were called by the corporation, in whose opinion the lands were not injured, but, on the contrary, were made better for building purposes by the construction of the road. Before that

was done they were unsuitable for building lots because of their low situation. The only expense would be the cost of filling, and against that these witnesses set the advantage to be derived from the new road, and when filled up the lots would be made good building lots. The cost of filling was variously estimated at from \$200 or \$300 to \$1,000.

Upon this evidence the arbitrators have awarded that the claimant is not entitled to compensation because his property has not been injuriously affected. Unless I could clearly see that they had arrived at this conclusion upon some erroneous principle, and not merely by setting off the advantage which in their opinion the claimant will derive from the work against the injury he evidently sustains from it, then I ought not to interfere with the award merely because I may think the weight of evidence is against the view which the arbitrators have taken. That is a matter peculiarly for them and not for the Judge, even when he is considering the merits of the case, as he is required to do by the 373rd section. This has been clearly pointed in the recent case of *Norval v. The Canada Southern R. W. Co.*, 41 U. C. R. 195, which I followed in the case of *Boys v. The Hamilton and North Western R. W. Co.* (a).

The observations of the Chancellor in *McKnight v. McKnight*, 12 Gr. 363, are very applicable to cases of this kind: "In forming a judgment of the value of the evidence given, the Master had the advantage of himself hearing the evidence, and of forming his judgment of the weight to be attached to it, depending in a great measure upon who the witnesses are, and their capacity of forming a correct judgment of the value of the land; while I, reading the evidence, see no more than that A. B. thought the land worth so much, and that C. D. thought it worth so much; but I cannot see that the opinion of one is worth more than the other; while the Master may have justly attached

great weight to the evidence of one, and very little to that of the other, or discarded it altogether. In other words, the Master, having before him materials for forming his judgment, which I cannot have, is much more likely to have arrived at a proper conclusion from the evidence than I can be. I ought to be able to see that he must be wrong in his conclusions of fact from the evidence before him, before I venture to say that he is wrong."

It may very well be that the construction of a good, dry, firm, and permanent road, in lieu of a bad, low, and wet one, is of such advantage to property in its neighbourhood, as in itself to compensate the owners for any expense they may be put to for filling up their lots or making approaches thereto.

There is ample evidence in the case to warrant the arbitrators, if they believed it, in coming to the conclusion which they have come to, and their integrity and ability are not impeached.

The right to compensation in respect of property injuriously affected, is, as regards municipalities, a new right; they are bound to keep their roads in repair, and I think that Courts ought to be specially careful not to embarrass them in the performance of their duties in this respect by too great a readiness to interfere with awards which happen to be in their favour. It is not often found that when a substantial injury has been sustained, arbitrators are slow to award ample compensation.

I will, if the parties desire it, remit the matter to the arbitrators to dispose of the question of what compensation the applicant is reasonably entitled to in respect of water flowing upon his premises, or in respect of drainage; or I will, if they prefer it, amend the award in that respect.

I do not think it is a case for costs.

Rule discharged.

RE HARRIS AND THE CORPORATION OF THE CITY OF
HAMILTON.

Municipal corporations—Market regulations—Power of Provincial Legislature—Definiteness of by-law.

By the Municipal Act (R. S. O., ch. 17, sec. 466,) sub-sec. 6, City Councils may pass by-laws "for preventing criers and vendors of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto."

Held, that this enactment was not *ultra vires* of the Provincial Legislature, as being a regulation of trade and commerce, but that it was authorized as a provision of municipal government.

Under this clause a City Council by by-law provided that no vendor of small ware should practise his calling in a certain market specified, or in the public streets adjacent thereto.

Held, not defective for not specifying more particularly the "small ware" intended, that being the term used in the statute; but that it was bad for uncertainty in not specifying the streets intended.

"Adjacent thereto," as used in the Act, means adjacent to the public streets.

On the 24th of June, 1879, *Robinson*, Q.C., obtained a rule *nisi*, on behalf of George Harris, calling upon the Corporation of the City of Hamilton to shew cause why by-law No. 149 of that corporation, passed December 9th, 1878, should not be quashed, wholly or in part, with costs, on the ground that the third, fourth, fifth, and sixth clauses of the said by-law were, or some one or more of the said clauses was, illegal and beyond the power of the said corporation: that the said third, fourth, and fifth clauses were unauthorized, inconsistent, uncertain, and indefinite, and too general and comprehensive in their terms, and that the said sixth clause, so far as it related to the said third, fourth and fifth clauses, was unauthorized and *ultra vires*: that there was no sufficient definition or statement in the said third section of the term "small wares," or of what it was intended to include therein, or of the streets or places in which the sale thereof was prohibited; and on the ground that if the said by-law was authorized by Act of the Provincial Legislature, the said Act was unconstitutional and *ultra vires*.

The clauses in question of the by-law were as follow :

3. On and after the first day of May next after the passing of this by-law no crier or vendor of small wares shall practise his or her calling in the James street market, or in the public streets adjacent thereto.

4. On and after the first day of May next after the passing of this by-law no person shall use or occupy any portion of the James street market for the purpose of exposing for sale or selling dry goods, fancy goods, small wares, or merchandize, pastry, confectionery, medicines, or any article other than meat, fish, fruits, vegetables, poultry, eggs, and farm and dairy products.

5. From and after the eighteenth day of December, one thousand eight hundred and seventy-eight, and up till the first day of May next thereafter, that part of the James street market consisting of the north-east corner thereof, and being bounded on the north by Merrick street, on the east by the poultry-sheds sidewalk, on the west by the central main sidewalk running north and south, and on the south by the side-walk running in a westerly direction from at, or near the end of the fish stalls, shall be set apart for occupation by all criers and vendors of small wares or merchandize, and such other persons as under sections three and four of this by-law shall after the said first day of May be thereby excluded from the said market, and such criers and vendors of small wares or merchandize and other persons in this section referred to, shall from and after the passing of this by-law be entirely excluded from all parts of the said James street market, other than the portion thereof contained within the limits in this section mentioned.

6. Any person who shall be guilty of any breach or infraction of this by-law shall be subject to the penalties imposed by by-law number one of this municipality, passed on the twelfth day of May, one thousand eight hundred and seventy-three.

On the 29th of August, 1879, *McKelcan*, Q. C., shewed cause, citing R. S. O., ch. 174, sec. 466, sub-secs. 2, 3, 4, 5 & 6;

Dillon on Municipal Corporations, 3rd ed., sec. 322; *Harrison's* Municipal Manual, 4th ed., p. 415-420; *Kelly and The Corporation of Toronto*, 23 U. C. R. 425; *Snell and The Corporation of Belleville*, 30 U. C. R. 81; *Neilly and The Corporation of Owen Sound*, 37 U. C. R. 289.

H. J. Scott supported the rule, stating that its uncertainty was the chief objection to the by-law, and citing *Lumley on By-laws*, 93.

December 12, 1879. ARMOUR, J.—By the municipal law, as it stood before Confederation, 29 & 30 Vic. ch. 51, sec. 296, the council of every city, town, and incorporated village might respectively pass by-laws for the following purposes: sub-section (6), for establishing markets; (7) for regulating all markets established and to be established: the places, however, already established as markets in such municipality shall continue to be markets, and shall retain all the privileges thereof until otherwise directed by competent authority; and all market reservations or appropriations heretofore made in any such municipality shall continue to be vested in the corporation thereof; (8) for preventing or regulating the sale by retail in the public streets of any meat, vegetables, fruit, or beverages; (9) for preventing or regulating the buying and selling of articles or animals exposed for sale or marketed; (10) for regulating the place and manner of selling and weighing butchers' meat, fish, hay, straw, fodder, wood and lumber. Of these sub-sections 6, 7 and 9 still continue to be the law, and appear in the R. S. O. as sub-sections 2, 3 and 5 of section 466 of ch. 174. Sub-sections 8 and 10 of 29 & 30 Vic., ch. 51, sec. 296, had substituted for them by 33 Vic., ch. 26, secs. 5 and 6, the following sub-sections, which are now sub-sections 4 and 6 of R. S. O., ch. 174, section 466: (4) for preventing or regulating the sale by retail in the public streets or vacant lots adjacent thereto of any meat, vegetables, grain, hay, fruit, beverages, small ware, and all other articles offered for sale; (6) for regulating the place and manner of selling and weighing grain, meat,

vegetables, fish, hay, straw, fodder, wood, lumber, shingles, farm produce of every description, small ware, and all other articles exposed for sale, and the fees to be paid therefor; and also for preventing criers and venders of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto.

It was contended that these two sub-sections, four and six, having been enacted since Confederation, were, or at all events that part of sub-section six, for preventing criers and venders of small ware from practising their calling, &c., was *ultra vires* of the Ontario Legislature, as being an interference with "the regulation of trade and commerce,"—a matter within the exclusive legislative authority of the Parliament of Canada.

I do not, however, think that the provisions in question are a regulation of trade and commerce, within the meaning of these words, as used in the British North America Act, so as to be beyond the powers of the Local Legislature, but are provisions for municipal government, and as such within the powers of the Local Legislatures, which may exclusively make laws in relation to matters coming within that class of subjects denominated municipal institutions in the British North America Act.

In using the term municipal institutions in the British North America Act it must have been in the contemplation of the Legislature that existing laws relating to municipal institutions should not be affected, and that the Local Legislatures should have power to alter and amend these laws, especially where, as in the case of the provisions under discussion the Local Legislature has only enlarged the scope of a power existing in the Municipal Act at the time of Confederation.

The councils of cities, towns, and incorporated villages, could pass by-laws, at the time of Confederation, for preventing the sale, by retail, in the public streets, of any meat, vegetables, fruit, or beverages. The Local Legislatures have surely the authority under their powers to make laws in relation to municipal institutions to extend

the scope of this power of prevention, by applying it to vacant lots adjacent to the public streets, and by including within it grain, hay, small ware, and other articles offered for sale.

The power to prevent the sale, by retail, of certain articles in the public streets is the same in substance as the power of preventing the sellers, by retail, of such articles from practising their calling in the public streets, and it is merely an extension of the scope of that power to prevent the criers and venders of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto.

I think the sub-sections in question were not beyond the powers of the Local Legislature to enact, and that the by-law is not assailable on that ground.

The use of the term "small ware" in the statute may certainly give rise to considerable difficulty, owing to the uncertainty that must exist as to what it includes; but this difficulty will have to be met only when it arises, and I do not think the by-law faulty for using the term used in the statute.

That part of clause three of this by-law, composed of the words, "or in the public streets adjacent thereto," is, however, bad for uncertainty.

The statute provides for the prevention of criers and vendors of small ware "from practising their calling in the market, public streets, and vacant lots adjacent thereto;" that is, vacant lots adjacent to the public streets.

The by-law could have prohibited the criers and vendors of small ware from practising their calling in the market, and in the public streets, and vacant lots adjacent thereto, that is, adjacent to such public streets, but not, as has been assumed to be done, in the public streets adjacent to the market, without, at all events, particularly describing such streets.

The third clause of the said by-law must, therefore, so far as the words "or in the public streets adjacent thereto" be quashed.

As the applicant succeeds in part and fails in part, there will be no costs.

Rule accordingly

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM MICHAELMAS TERM, 42 VICTORIA, TO MICHAELMAS TERM, 43 VICTORIA.

ACTION.

Against Justice of Peace.—See
NOTICE OF ACTION.

Against Sheriff.]—See SHERIFF.

ADMINISTRATION OF JUSTICE ACT.

*Proper practice on transfer of cause
under.]—See* LIMITATIONS, STATUTE
OF.

ADOPTION.

See AGREEMENT.

AGENT.

See INSURANCE, 1.

AGREEMENT.

*Railway—Subscription for stock
—Condition as to payment in goods.]
—Defendants subscribed under seal
for certain shares in the capital stock*

of the plaintiffs' company, promising and agreeing with each other and with the plaintiffs to pay the full amount of the shares as and when payable :

Held, that the evidence shewed only a collateral agreement or representation by the president of the provisional board that payment would be accepted in goods, and not a subscription conditional on such acceptance.

Semble, that if the evidence had shewn such a condition made verbally, it could not have varied the unqualified subscription under seal, or bound the company.

The defendants after such subscription paid ten per cent. on the stock, being advised, as they alleged, by the plaintiffs that it was their best course to get rid of the stock by assignment, which could not be permitted until such payment : *Held*, clearly an irrevocable adoption of the stock. *Kingston Street Railway v. Foster et al.*, 552.

ALTERATION.

See PROMISSORY NOTES; 2.

AMENDMENT.

No power to amend conviction improperly awarding costs.]—See COSTS, 2.

See CHURCHES—ARBITRATION AND AWARD, 3.

APPEAL.

County Court Judge sitting in Chambers a Court of Appeal within 40 Vic. ch. 27, D.]—See TAVERNS AND SHOPS.

Time for, against railway award.]—See ARBITRATION AND AWARD, 2.

Mode of, against award.]—See ARBITRATION AND AWARD, 4.

See COSTS, 1.

ARBITRATION AND AWARD.

1. *Finality—Certainty.*]—By a submission, after reciting that differences existed between the parties as to the disposition to be made by P. of certain funds collected by him from the tenants of certain lands, and that they had agreed to refer the same to S., the parties covenanted to abide by his award “of and concerning the premises aforesaid, or anything in any manner relating thereto.” It appeared that one D. conveyed to P., with full covenants, three undivided fifths of a certain lot, of which it afterwards turned out that he owned only one-fifth, and that P. had collected rents from the tenants of D. on the other lands for the purpose, as he alleged, of repaying himself what he had paid D. for the two-fifths.

The arbitrator found that the funds in P.’s hands were collected by him for that purpose, and awarded that he should retain for himself five per cent. on the sums collected, and should out of the balance repay himself two-thirds of the purchase money paid by him.

Held, that the award embraced all matters submitted: that there was no necessity and no power to direct a reconveyance of the two-fifths, and that it was sufficiently certain without specifying the amount to be repaid. *In re Alexander Campbell, John Mudie, Lucretia H. Prentiss and George Peck*, 218.

2. *Time for moving against—Railway Act—R. S. O. ch. 165, sec. 20, sub-sec. 19.*]—An award against a railway company, under the Railway Act, R. S. O. ch. 165, for land taken, was made on the 15th January, and a copy of the award served on the secretary on the 22nd. On the 18th February a rule *nisi* was obtained to set aside the award, the only material filed upon the motion being a copy of the award, and an affidavit merely stating what one of the arbitrators had informed the secretary of the company were the items constituting the sum awarded, but the evidence given before the arbitrators was not brought before the Court until the 7th March, when the claimant in shewing cause produced what he stated to be the evidence.

Held, that the application was not an appeal under R. S. O. ch. 165, sec. 20, sub-sec. 19, there being no evidence brought before the Judge to enable him to decide any question of fact, but the ordinary application to set aside an award, and that as such it was too late, the time for so doing having expired on the 15th February, the last day of the Term following the award.

Quære, whether service of a copy of the award was a sufficient notice thereof, under said sub-sec. 19; but *Held*, that, even if so, the only evidence of what took place before the arbitrators not having been produced in court for more than a month after such notice, the time allowed for *appealing* had expired. *In re Grand Junction Railway Company and Masson*, 203.

3. *Railway — Award — Bond for value of land and compensation — Evidence in action on — Notice of award — Adding plea.*]—A railway, requiring immediate possession of the plaintiff's land, procured defendants to give their bond to plaintiff for the purchase money, conditioned to be void on payment or deposit in Court, under the provisions of the Railway Act, of the amount of the purchase money, to be ascertained by arbitration proceedings then pending under said Act, within one month from the making of the award: *Held*, 1. That an award having in fact been made, its merits could not be tried in an action on the bond. 2. That the award was not necessarily vitiated by reason of the arbitrators having allowed compensation for increased risk of loss by fire. 3. That in such action the defendants could not examine one of the arbitrators to show at what he estimated the value of the land, and whether general damages were awarded in addition to specific damages. 4. That it is not necessary before bringing such an action that a month should elapse after a written notice from one of the arbitrators to the defendants of the making of the award, as sub-sec. 19, sec. 20, ch. 165 R. S. O., applies merely to the right of appeal from the award.

No suggestion having been made as to any defect in title, and plain-

tiff's counsel offering at once to deliver a conveyance of the land to the company, the Court refused to allow a plea to be added denying tender of conveyance before action—*Masson v. Robertson et al.*, 323.

4. *Railway arbitration — Appeal against award — Refusal to interfere — Practice — R. S. O., ch. 165, secs. 19, 20.*]—The most proper and convenient mode of appealing against an award under "The Railway Act of Ontario," ch. 165, secs. 19 & 20, is by rule *nisi*, upon reading the evidence taken by the arbitrators and transmitted by them under sub-sec. 12.

The Court will not interfere with such award upon the merits unless it is clearly wrong, and where there was no imputation against the arbitrators, who had examined the property and seen and heard the witnesses, whose evidence as to the value of the land was extremely contradictory, *OSLER, J.*, refused to interfere on the ground that the sum given was too small. *In re The Hamilton and North Western Railway Co. and Boys*, 626.

5. *Property abutting on highway — Raising and lowering of highway — Compensation — R. S. O. ch. 174, secs. 383-456 — Conflicting evidence — Interference with award.*]—Upon a reference under the Municipal Act, R. S. O. ch. 174, to determine the compensation to which the applicant was entitled for raising and lowering a street in a town in front of his land:

Held, 1. That the omission of the written statement required by sec. 383 of the Act to be put in by Arbitrators, is not necessarily a ground for setting aside their award, and it may be afterwards supplied. 2. That the award should not be set aside for

not dealing with the question of compensation for injuries sustained by the *lowering* as well as raising the street, the evidence being hardly directed to this at all, and no appreciable damage clearly shewn ; and if necessary, the court would, under sec. 383, amend the award in this respect. 3. That it is competent for arbitrators in such a case to find that no damage has been sustained, and they are not bound to award some or merely nominal damages.

The distinction between arbitrations under our Municipal and Railway Acts and the English Lands Clauses Consolidation Act pointed out, and remarks as to the right to enforce such awards summarily.

When the evidence is conflicting as to whether damage or benefit has resulted to the party affected, the Court will not interfere with an award, merely because it may think the weight of evidence to be against the view taken by the arbitrator. *In re Colquhoun and the Town of Berlin*, 630.

6. *Presence of parties—Invalidity of award.*—H. insured a stock of teas, &c., and having sustained loss by fire, the matter was referred to L. and C., and a third party to be appointed by them, the appraisement and estimate of the loss by them, or any two of them to be binding. L. and C. appointed M. third arbitrator. After the close of the evidence and several meetings by the arbitrators, M. having drawn the document set out in the case, produced it at a meeting of the arbitrators, and read it as his finding. At the next meeting a document formally drawn up by the company's solicitor was produced and signed by M. ; but for some reason it was abandoned. At this meeting the arbitrators permitted the mana-

ger and inspector of the company to be present and take part in the discussion as to the amount of the award and the fixing of the costs. L. and M. agreed on the amount, but C. said he would not sign such award, and an appointment was then made for the next day, C. being present, to meet, and sign it. The award was accordingly made on the following day by L. and M., C. not attending :

Held, that under the circumstances C.'s absence formed no objection.

Held, also, that permitting the officers of the company to be present and take part in the deliberations of the arbitrators was such improper conduct as to render the award bad.

Held, also, that the document, written and signed by M. and expressed throughout in the first person as his decision alone, without any thing contained therein shewing it to be the decision of L. also, although signed by L., could not be upheld as the award of two arbitrators.—*Re Hubbard v. The Union Fire Insurance Co.*, 39

[Affirmed on appeal to the full Court.]

On application to set aside award under the Municipal Act, what materials to be filed.—See MUNICIPAL CORPORATIONS, 2.

See ARBITRATION AND AWARD, 4, 5—MUNICIPAL CORPORATIONS, 2—WORK AND LABOUR, 1.

ARBITRATOR.

Not liable to examination as to what he estimated the value of land at for railway.—See ARBITRATION AND AWARD, 3.

ARREST.

Action lies against Sheriff for not arresting attorney under attachment

for disobeying order to hand over deeds.—See SHERIFF.

ASSIGNEE.

Of chose in action.—See LANDLORD AND TENANT, 1.

ASSIGNMENT.

Of policy of insurance to one not interested in property insured.—See INSURANCE, 4.

Of chose in action.—See EQUITABLE ASSIGNMENT—LANDLORD AND TENANT, 1.

ATTACHMENT.

See SHERIFF.

BAILIFF.

Of Superior Court of Montreal, may execute writ from Court there instead of sheriff.—See BANK SHARES.

BANKRUPTCY AND INSOLVENCY.

See FOREIGN JUDGMENT—INTERPLEADER—PROMISSORY NOTES, 2.

BANK SHARES.

34 Vic. ch. 5, sec. 25, D.—*Application for award of shares—Writ executed by bailiff and not by sheriff—Head office at Toronto—Sale in execution in Montreal.*—Upon an application by a bank, whose head office was in Ontario, under sec. 25

of the Banking Act of 1871, 34 Vic. ch. 5, D., for an order adjudicating and awarding shares : *Held*, that an execution from the Superior Court of Montreal might be validly executed by a sworn bailiff of that Court instead of by the sheriff, and the bailiff might fulfil the duty imposed upon the sheriff, under sec. 19 of the Banking Act.

Held, also, that a sale in execution in Montreal might be made of shares of a bank whose head office was in Toronto. *In re Bank of Ontario*, 247.

BANKS.

See PRINCIPAL AND SURETY.

BILLS OF EXCHANGE.

Bill drawn on president of R. W. Co.—Acceptance—Personal liability.—The charter of the Midland R. W. Co., 16 Vic., ch. 241, sec. 5, gives them power to become parties to bills and notes, and enacts that any bill accepted by the president, with the countersignature of the secretary, or any two of the directors, and under the authority of a majority of a quorum of the directors, shall be binding on the company, and every bill accepted by the president as such, with such countersignature, shall be presumed to have been properly accepted for the company, until the contrary be shewn : that the seal shall be unnecessary, nor shall the president, &c., so accepting any bill, be individually liable.

A bill of exchange addressed, "To the President, Midland Railway," was accepted in these words, "For the Midland Railway of Canada, accepted, H. READ, Secretary ; GEO.

A. Cox, President": *Held*, CAMERON, J., dissenting, that defendant Cox, (who was admitted to be the president,) was personally liable, the bill not being drawn upon the company. — *Madden v. Cox et al.*, 542.

See Pleading.

BY-LAW.

1. *Omission in—Refusal to quash.*] —The Court, in the exercise of its discretion, refused to set aside a by-law to grant \$35,000 to a railway company, good on its face, and which it considered to have been passed in good faith, merely because of the unintentional omission therefrom of the statement of an existing debt of about \$2,700, the assessed value of the property in the municipality being about \$1,500,000. *In re Lloyd and Corporation of the Township of Elderslie*, 235.

2. *Defects on face of—Validity—Practice.*] —Where by one clause of a by-law to grant a bonus of \$30,000 to a railway the last instalment of principal and interest due upon certain debentures to be issued under it was made payable on a day named, being ten days beyond twenty years from the day on which the by-law was to come into force, but by the preceding clause the debentures were to be payable in twenty years at furthest from that day, the Court refused to quash.

The by-law showed the whole ratable value of the property of the municipality to be \$668,293, and directed a rate of three and nine-tenths mills in the dollar. It appeared that the rate directed to be levied would produce about \$150 less than the total amount of the debt to

be incurred, but on this ground also the Court would not interfere.

On the return of the rule counsel for the corporation desired to support it, and tendered affidavits for that purpose; but *Held*, that after the issue of the rule such affidavits could not be received from any party to strengthen the applicant's case. — *Gilchrist v. Sullivan*, 588.

See CONVICTION, 2—DRAINAGE, 2 —LIVERY STABLES—MANDAMUS, 3 —MUNICIPAL CORPORATIONS, 1, 3.

CARRIERS.

See TROVER, 1.

CHATTEL MORTGAGE.

Chattel mortgage—Affidavit of bona fides—Insufficiency.] —The affidavit of *bona fides* on a chattel mortgage was made by the manager of a loan society, no written authority to him being filed with the mortgage, nor any statement contained in the affidavit as to his knowledge of the circumstances: *Held*, insufficient.

Bank of Toronto v. Macdougall, 15 C. P. 475, distinguished. — *Freehold Loan and Savings Co. v. Bank of Commerce*, 284.

CHOSE IN ACTION.

See LANDLORD AND TENANT, 1.

CHURCHES.

Trust deed in favour of church—Provision for appointment of new trustees—Ejectment—Right of sur-

living trustee to recover—R. S. O. ch. 216.]—Land was conveyed to the plaintiff Coleman and four others as “the trustees of the congregation of the Independent Methodist Episcopal Church,” with a provision, in case of death or ceasing to be a member of the said church, for the appointment of a successor or successors. The congregation, acting under the directions of what was called the “Book of Discipline,” which provided for an annual election of trustees, elected annually trustees for the property in question, and, among others, the plaintiffs. One of the original trustees under the deed died, and all the others, except the plaintiff Coleman, ceased to be members of the church. Subsequently three of the defendants accepted a lease of the property from Coleman. In ejectment by Coleman and his co-plaintiffs, *Held*, that these co-plaintiffs had been improperly joined with him, for that having been elected trustees under the “Book of Discipline,” and not under the provisions of the trust deed, in place of deceased or disqualified members of the church, they were illegally elected and never in fact became trustees, and their names were therefore ordered to be struck out of the record.

Held, also, that Coleman was entitled to recover against the defendants, who entered under the lease from him, as they could not deny his title, and there was sufficient evidence of disclaimer on their part to dispense with a notice to quit.

Held, also, that if the deed did not create the grantees, by virtue of R. S. O. ch. 216, a corporation, and they were to be regarded merely as natural persons, the legal estate was in Coleman and the other three sur-

living grantees under the deed, and Coleman was entitled to recover an undivided fourth part of the land; but that if the grantees were created a corporation, then the legal estate was in the corporation, or in the trustees in a corporate capacity, and Coleman was the only corporator, the others having either died or ceased to be corporators by reason of their having ceased to be members of the church.

Objection having been made on the argument, for the first time, that the action should have been brought in the corporate name, or at any rate under the designation in the deed, the Court allowed the record to be amended in this respect, and the verdict to stand in favour of the plaintiff Coleman.—*Coleman et al. v. Moore et al.*, 328.

COMPENSATION.

Under R. S. O. ch. 174, for raising and lowering a street in front of land.]—See ARBITRATION AND AWARD, 5

CONDITION.

As to payment in goods of stock.]—See AGREEMENT.

CONFUSION OF PROPERTY.

See WAREHOUSE RECEIPTS.

CONSTITUTIONAL LAW.

See CONTRACT WITH DOMINION OF CANADA—MANDAMUS, 3—MUNICIPAL CORPORATIONS, 3.

CONTRACT WITH DOMINION OF CANADA.

Petition of right—Contract with the Dominion before Confederation—Liability.—A Petition of Right set out an agreement made in 1866 between the petitioners and the Queen, represented by the Commissioner of Public Works of Canada, for the performance and completion by the 1st of September, 1868, of the carpenter's work required on certain additions to the Provincial Lunatic Asylum at Toronto, and complained that owing to the delay in proceeding with other work, which the said Commissioner promised to have done in time, they were delayed and unable to finish their work before July, 1870, and thereby put to great expense. They then alleged that their work was performed under the superintendence and control of the Commissioner of Public Works for Ontario, and for the sole benefit of, and paid for by, that Province; and that by an arbitration held under sec. 142 of the B. N. A. Act in 1870, the said Asylum became the property of Ontario. *Held*, that the Province of Ontario was not liable. *Macdonald et al. v. The Queen*, 239.

CONVICTION.

1. *Medical practitioner—R. S. O. ch. 142, sec. 40—32-33 Vic. ch. 31, sec. 73, D.*—A conviction for practising medicine without license or being registered as a medical practitioner, under R. S. O. ch. 142, sec. 40, omitted to add "for hire, gain, or hope of reward," and it did not appear that the defendant had appeared and pleaded, and that the merits had been tried, and that the defendant had not appealed, or that the con-

viction had been affirmed on appeal, so that the 32-33 Vic. ch. 31, sec. 73 was not applicable: *Held*, that the conviction must be quashed. A conviction should, if possible, state the facts necessary to bring it within that section, and it should not be drawn up until the four days for giving notice of appeal have elapsed. *Regina v. Hessel*, 51.

2. *Temperance Act of 1864—Conviction—Evidence in support of—Formal defects.*—Notice to the Collector of Inland Revenue of the passing of a by-law under the Temperance Act of 1864, *Held*, sufficient, and that the by-law was in force, notwithstanding that the Inspector of Licenses had not been notified under R. S. O., ch. 182, sec. 8.

An affidavit was allowed to be used, after conviction, to prove proper notices to the Inspector of Inland Revenue, and to support the conviction.

The omission to endorse upon the notice of passing of the by-law, the certificates under sec. 6 and sub-secs. of the Act of 1864, *Held*, immaterial, and that copies of such certificates were sufficient, objection to the same not appearing to have been taken before the Police Magistrate; and although the by-law was then put in issue, objections to proof of the same were overruled on the ground that the objections were not urged before the Police Magistrate, and the defects pointed out, and that they were of a technical nature, and if taken might have been cured.—*ARMOUR, J. dissenting.*

Held, also, *ARMOUR, J.*, dissenting, that the statement of there being seven distinct offences and only one whole fine or penalty for the whole, and the omission to negative the exceptions in the enacting clauses, were

not fatal to the conviction under the Temperance Act. The by-law being held to have been proved, and the form of conviction not being defective, *Held*, that the application to quash the conviction must fail.—*Regina v Roddy*, 605.

See COSTS, 2—LIVERY STABLES—MANDAMUS, 3—MEDICAL PRACTITIONER, 2—TAVERNS AND SHOPS.

CORPORATION.

Subscription for stock.] — *See* AGREEMENT.

See BILLS OF EXCHANGE—CHURCHES—PROMISSORY NOTES, 1.

COSTS.

1. *Costs of the day—Appeal from clerk of crown and pleas—R. S. O. ch. 39. sec. 31.*]—Plaintiff being ready to proceed with the trial of his case at the assizes, defendant's counsel applied for a postponement, stating that defendant and his witnesses had not arrived, to which plaintiff did not object, though anxious to have the case disposed of. On the following day, when the cause was again called on, plaintiff was not ready, owing to the absence of a witness, who had been there the day before, but the Judge insisted upon the case proceeding, whereupon plaintiff, in order to avoid a nonsuit, withdrew the record :

Held, that defendant was entitled to the costs of the day, and an order made by the Clerk of the Crown and Pleas, setting aside a sidebar rule therefor, was accordingly rescinded.

Held, also that the single Court was not precluded from disposing of an application to rescind such order,

on the ground that no application for the purpose had been made to a Judge in Chambers within four days after the making of the order under the rule of Court of Hilary Term, 1870, the exception contained in section 31 of ch. 39, R. S. O., merely providing an additional or more speedy mode of appeal, and not taking away the right of resort to the Court for the purpose. *Parkinson v. Thompson*, 29.

2. *Attempt to obtain information as to voting—R. S. O. ch. 174, sec. 162—Conviction—Costs—Amendment.*]—There is no general power to award costs upon a conviction under an Ontario Statute, where such power is not given by the Statute itself; and therefore where, on a conviction under section 162, ch. 174, R. S. O. for attempting to obtain information at a polling place as to the candidate for whom a voter was about to vote, costs were awarded against the defendant, the conviction was ordered to be quashed.

Held, also, that there was no power to amend the conviction in this respect. *Regina v. Lennon*, 456.

Jurisdiction of Quarter Sessions as to.]—*See* MANDAMUS, 2.

Refusal of, to party giving no assistance to Court, &c.]—*See* INTERPLEADER.

COUNTY JUDGE.

Sitting in Chambers, a Court of Appeal under R. S. O. ch. 75 and ch. 181, sec. 71.]—*See* TAVERNS AND SHOPS.

COVENANT.

Not to cut down timber.] — *See* WASTE.

COVENANT FOR TITLE.

See LANDLORD AND TENANT, 3.

CRIMINAL LAW.

See CONVICTION.—MANDAMUS, 3.

CUSTOM.

See DEDICATION.

DAMAGES.

See LATERAL SUPPORT—MASTER AND SERVANT, 2—TROVER.

DEDICATION.

Highway and square—Dedication—Plan filed—Mineral springs—Custom.—The owner of a township lot, having some mineral springs upon it supposed to be valuable, subdivided the land into village lots and streets, according to a plan, which he registered in 1839, and sold and conveyed lots by. On this plan was represented a square called "Richmond Square," in which the springs were situate. Until 1877 no charge was made for the water to those who came to drink it, but it was charged for by the gallon when carried away, and was sent to different parts of the country for sale: *Held*, that this shewed no intention to dedicate the square or the springs to the public, so as to give any right of entry or to drink the water without charge.

Held, also, following *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687, that pleas setting up a custom for the inhabitants of the surrounding

country as of right to drink the water for forty years were bad, for such right could not be claimed in gross under the Prescription Act, R. S. O. ch. 108, sec. 38.

Semble, per HAGARTY, C. J., that apart from the statute, the alleged custom was bad, as being too large, and not confined, either in the pleas or in the evidence, to any particular class of persons.

Quere, whether a custom could be proved in this Province, there being no time immemorial on which to found it, especially where, as here, the land sought to be burdened therewith was only granted by the Crown within fifty years.

Upon the evidence in this case, *Per* ARMOUR, J., there was a highway leading to the springs legally established by the Quarter Sessions in 1829, and by the plan filed in 1839, and by dedication, and not legally closed by the proceedings taken and by-law passed in 1858; for, among other reasons, there was no proof that the formalities prescribed by the 22 Vic. ch. 99, sec. 308, as giving the right to pass such by-law had been observed. *Per* HAGARTY, C. J., such objections could not now be entertained, and the evidence shewed that since that time there had been no user as a public highway, but only by persons going to and from the hotel and grounds, or to drink at the springs. *The Grand Hotel Co. v. Cross*, 153.

See EXCEPTION.

DEED.

Purchase for value without notice—Registry laws.—One M. prepared a deed of the land in question, which

purported to be executed in plaintiff's favour and delivered by him, and requested one C. to witness his execution of it, which C. did. He then procured C. to swear to the affidavit of execution, in the usual form, for registry. Subsequently, in a moment of anger against the plaintiff, he tore up the deed, the pieces of which plaintiff collected and stitched together: *Held*, that the deed was executed and delivered, so as to vest the land in plaintiff.

After tearing up the deed, M. willed one-half of the land to his nephew, and the remaining half to others, and the nephew conveyed the whole lot to a purchaser for value without notice of the plaintiff's deed, both will, and deed to this purchaser, being registered before the plaintiff's deed: *Held*, that the registration of the will and of the deed prevailed over plaintiff's unregistered deed, as to the moiety conveyed by the nephew; but as to the other moiety devised, plaintiff was entitled to hold this part under the deed from M. as against the devisees under the will. *McDonald v. McDonald*, 291.

See EXCEPTION.

DEFAMATION.

See LIBEL.

DELIVERY.

Wrongful.—See TROVER, 1.

DISCHARGE.

In bankruptcy.—See FOREIGN JUDGMENT.

Negligent loss of security by principal.—See PRINCIPAL AND SURETY.

DOWER.

Report of commissioners binding—*R. S. O. ch. 55.*—The husband of demandant, being possessed of the land in question, a 100 acre lot, conveyed it to S., 20 acres being at the time cleared. After alienation some 70 acres more were cleared. The defendant having admitted demandant's claim, the sheriff appointed commissioners, who awarded demandant seven acres of the cleared and four of the uncleared land. The land in question, as well as that in the neighbourhood, had greatly increased in value, and besides the clearing had been improved by fencing and buildings; but no part of the buildings was awarded to demandant. It appeared that the commissioners had considered the clearing of land a permanent improvement under sec. 35, subsec. 2, ch. 55, R. S. O., but that they did not award any portion of the land cleared by the purchaser to demandant:

Held, that the report should not be disturbed unless upon the clearest evidence of its injustice, and no case was made in the present instance to induce the Court to interfere.

Per ARMOUR, J.—The clearing of land for farming purposes is a permanent improvement. *Robinet v. Pickering*, 337.

DRAINAGE.

1. *R. S. O. ch. 174, sub-secs. 535, 639, 540.*—Where an award has been made as to drainage work under R. S. O. ch. 174, secs. 535, 539,

540, the township to be benefited must pass a by-law under sec. 539 to raise the sum awarded against it, and cannot refuse payment until the work is completed.

There is no remedy expressly provided by the Act for the case of improperly or insufficiently executed drainage work. If not executed at all, the money may be recovered as on a failure of consideration. *Corporation of Chatham v. Corporation of Sombra*, 305.

2. *Omission to publish notices.*—*Held*, that where a drainage by-law had been published without the notice of the holding of a Court of Revision for the purpose of hearing complaints against the assessment at some day, “not earlier than twenty, nor later than thirty days from the day on which the by-law was first published,” as required by the Municipal Act, R. S. O. ch. 174, sec. 529, sub-sec. 8, it was bad, and must be quashed.

The non-publication of the notice required by sec. 531 is not fatal to the validity of a by-law. *In re Ferguson and the Township of Howick*, 41.

See MUNICIPAL CORPORATIONS, 2.

EASEMENT.

See DEDICATION—LATERAL SUPPORT.

EJECTMENT.

Mortgagor and mortgagee—Reformation of mortgage—Absence of redeem clause.—Defendant applied to plaintiffs, a money lending company, after being shewn their loan

tables, on a form of application provided by the plaintiffs, for a loan of \$2,000, payable in twenty years, by quarterly payments, according to the plaintiffs' scale of repayments. This scale shewed the quarterly payments required to repay \$1,000 in twenty years to be \$26.85, or \$53.70 for \$2,000, the sum required by the defendant. The loan tables had this notice printed on them: “The loan table is for the inspection of all, rendering borrowers free from the possibility of extortion, deception, or fraud, the loan being made at a fixed uniform rate.” The application was submitted to the loan committee of the plaintiffs' board of directors and passed, it not being shewn or appearing that the committee was aware of any change from the loan table. A mortgage was afterwards prepared under the directions of the plaintiffs' manager, and signed by the defendant, wherein the quarterly payment was stated to be \$57.60 instead of \$53.70, and the plaintiffs' manager swore that he told defendant the quarterly payment would be \$57.60 when he applied for the loan. This the defendant denied. The mortgage contained no redeem clause. Defendant paid the first quarterly instalment, stating that he thought the amount too much. The second instalment he got a member of the plaintiffs' company to pay for him, telling him, as he said, of the mistake. This person, being indebted to defendant, paid the full amount. When the third payment matured, defendant tendered to plaintiffs the correct amount, after crediting himself with the overpayments on the first two instalments. This the plaintiffs refused to accept and brought ejectment, claiming a right to possession of the land mortgaged, both by

reason of the default in payment of the third instalment, and because there was no re-demise clause; so that, default or no default, they were entitled to immediate possession. Defendant pleaded the foregoing facts, by way of equitable defence, and prayed that the mortgage might be made to conform to the true agreement: *Held*, HAGARTY, C. J., dissenting, that the loan table and defendant's written application referring thereto, accepted by plaintiffs' loan committee, constituted the agreement between the parties, and that the mortgage, notwithstanding the manager's statement that he had told the defendant the amount of the quarterly payment as stated in the mortgage, did not correctly set forth the true agreement, and therefore the defendant was entitled to have it reformed; and that rectification, and not rescission, was the proper remedy.

Held, also, that, notwithstanding the omission of the redemise clause, it sufficiently appeared from the provisions of the mortgage itself and the rules and regulations of the plaintiffs' company that it was the intention of the parties that the defendant should retain possession until default, and the plaintiffs should, therefore, be enjoined from disturbing the defendant's possession until such default. *Superior Savings and Loan Society v. Lucas*, 106.

By title paramount.—See LANDLORD AND TENANT, 3.

See LIMITATIONS, STATUTE OF—CHURCHES.

ELECTION.

See CONVICTION, 2—MANDAMUS, 1.

ENGINEER.

Certificate of.—See WORK AND LABOUR.

EQUITABLE ASSIGNMENT.

Equitable assignment of non-existing fund—Assignment of chose in action—R. S. O. ch. 116.—One W., plaintiff's tenant, being in arrear for rent, and having wheat in the barn, had a settlement with plaintiff, when plaintiff told him he must give him security before he would allow him to ship his grain. It was agreed that plaintiff should see defendant, to whom W. had been in the habit of shipping his produce, and ascertain whether he would accept an order from W. for the grain. Defendant agreed to accept the order, which he drew out, mentioning, however, no amount. Plaintiff and W. then saw defendant, when W., in defendant's presence, signed an order on defendant for \$299.85 in the plaintiff's favour, which defendant said he would pay as soon as he realized on the grain. There was conflicting evidence as to whether plaintiff did or did not tell defendant that unless he got the order he would not let the grain go; but he admitted that he drew the order, and its execution by W., and that he told the plaintiff he would pay it. The grain had not at that time been, but was on the 4th of October following, shipped to defendant, who subsequently sold it, and paid the proceeds to W., who had verbally instructed him before the receipt of the grain not to pay the order in plaintiff's favour, though written instructions to that effect did not reach him until after its receipt.

Held, that plaintiff was not entitled to recover as on an assignment

of a chose in action under R. S. O., chap. 116; but *Held*, CAMERON, J., dissenting, that the property was stamped with the equitable right, and that defendant was not merely cognizant of such claim, but had promised to co-operate in enforcing it, and that when the property reached his hands he was bound to carry out the trust, and no interference on W.'s part could relieve him from the obligation.

Per ARMOUR, J.—That the plaintiff was entitled to succeed on the common counts.

Per CAMERON, J.—That at the time of the order, claimed by plaintiff to constitute an equitable assignment, there was no fund in existence upon which it could operate, and no contract proved: that W. was therefore at liberty to make any arrangement he pleased with the defendant and when he delivered the grain to him, after notifying him not to pay the order, defendant must be held to have received it on the understanding that he would not pay it. *Mitchell v. Goodall*, 398.

EVICTIION.

See LANDLORD AND TENANT, 2.

EVIDENCE.

See AGREEMENT — ARBITRATION AND AWARD, 3, 5—CONVICTION, 2—FOREIGN JUDGMENT—LATERAL SUPPORT—LIFE INSURANCE, 1—MALICIOUS PROSECUTION — PROMISSORY NOTES, 2.

EXCEPTION.

Deed—Exception—Right of way.
—E., owning land through which

Victoria street ran part of the way, from N. to S., conveyed to the plaintiff four acres S. of that street, "with the exception of continuing Victoria street across said lot." Afterwards E. conveyed to W., by a statutory deed, 65 acres adjoining plaintiff's land on the south, and W. conveyed to defendant.

Held, CAMERON, J., dissenting, that by the deed to the plaintiff the continuation of Victoria street was excepted out of the land conveyed; that upon the evidence, set out below, this continuation was when E. conveyed to W. a way actually used across the plaintiff's land to W.'s land, and so passed by the deed to W. and from him to defendant, who was, therefore, not liable in trespass for entering to repair the way.

Per CAMERON, J.—The deed to the plaintiff contained only a reservation of a right on E.'s part to continue the street, and the evidence shewed no dedication to the public or justification for defendant's entry. *Hebner v. Williamson*, 593.

See REGISTRY LAWS.

EXECUTION.

See BANK SHARES.

EXECUTOR.

Executor de son tort—Administrator.—An action will not lie against one as executor *de son tort*, where there is a legally appointed administrator, even though the latter may have conveyed the estate to the former on condition of his paying the debts of the deceased. *Armstrong et al. v. Armstrong*, 615.

See PROBATE.

FOREIGN JUDGMENT.

Foreign discharge in bankruptcy —[Evidence.]—Plaintiff sued on a foreign judgment recovered against defendant, who pleaded never indebted, and never served with proceedings in the foreign Court. During the progress of the suit defendant obtained a discharge in bankruptcy in the District Court of the Northern District of Ohio, and at the trial obtained leave to plead this discharge as a plea *puis durrein continuance*, on which issue was taken. Defendant proved that such a discharge would release defendant from all his debts, provable against his estate, in the United States, including the debt to plaintiff. Plaintiff's only evidence in reply was, that defendant resided in Canada for two years previous to the discharge, and that he (plaintiff) had no notice of defendant's bankruptcy in the United States, and he contended that, as the Bankruptcy Acts required the bankrupt to reside or carry on business in the State where he filed his petition, and the defendant resided in Canada, the Court in Ohio had no jurisdiction to grant a discharge, and that the one produced was therefore bad: *Held*, that the discharge was a bar to plaintiff's suit. *Held*, also, that it was not necessary for defendant to prove that all proper steps had been taken to obtain the discharge, but that the discharge itself was *prima facie* evidence of this. *Ohlemacher v. Brown*, 366.

HIGHWAY.

Raising and lowering of]—See ARBITRATION AND AWARD, 5.

See DEDICATION.

HUSBAND AND WIFE.

See SURRENDER.

IMPROVEMENT.

See DOWER.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE.

1. *Agent of Co. acting for insured* —[*Misdescription of premises*.]—At the foot of an application for insurance on a block of five buildings under one roof, there was above the signature of the applicant an agreement, declaration, and warranty that if the agent of the company filled up the application, he should in that case be the agent of the applicant and not that of the company.

The plaintiff signed a printed form of application in blank, which he gave to the agent, telling him to examine the buildings and fill it up. This the agent did from an examination and diagram of the buildings which he had made on a previous occasion; and in answer to the question, "Is there any other fact or circumstance affecting the risk with which it is necessary that the company should be made acquainted?" he answered "No. It is a first-class building in every respect: although one roof covers all, there is a solid brick fire wall between each store or building."

The defendants set this up, as a defence under the Statutory Condition No. 1. There was not, as a fact, such a wall, and the jury found that

this was a misdescription and misstatement of a fact material to the risk. *Held*, ARMOUR, J. dissenting, that the plaintiff could not recover. *Per* ARMOUR, J., under the circumstances, set out in the report, the fact was not one in the view of the defendants which was material to the risk, nor was the misdescription to the prejudice of the company.—*Sowden v. Standard Insurance Co.* 95.

[Affirmed in Appeal.]

2. *Statutory conditions—Variations—Reasonableness of condition—Non-payment of premium note falling due after loss.*—Under the statutory conditions endorsed on a policy of insurance were printed in different coloured ink, but in the same sized type, the words prescribed by sec. 4 of ch. 162, R. S. O. Then followed in much larger type, and in the same coloured ink, the words “additional conditions,” and below this heading the following condition: “In case any promissory note for a cash premium, or for any payment or assessment on any premium note * * given to the company, or to any officer or agent, be not paid when due, the policy * * shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such note.” The note in this case given for \$12, the first payment on the premium note, fell due on the 15th April, 1878, and the loss, exceeding the amount insured, \$500, took place on the 23rd March. This note was not paid, the plaintiff alleging that he omitted to pay, assuming the defendants would deduct it on settling the loss, which had not been adjusted. *Held*, ARMOUR, J., dissenting, that the statute had been sufficiently complied with as to the

additional condition, which was sufficiently indicated and set forth so as to be binding upon the assured. *Held*, also, ARMOUR, J., dissenting, that the condition was not an unreasonable one, and that the plaintiff could not recover, there being nothing in the evidence set out in the case sufficient to shew a waiver of the payment. *Per* ARMOUR, J. 1. The condition was unjust and unreasonable, and especially under the circumstances of this case, with reference to which its validity must be determined. 2. The conduct of the defendants, as set out in the case, afforded a good equitable answer to the alleged forfeiture. 3. The note having been taken payable to the defendants’ agent, not to defendants, and not such as defendants were authorized to take, there could be no forfeiture for its non-payment without first presenting it at maturity and demanding payment. *Ballagh v. Royal Mutual Fire Insurance Co.* 70.

[Reversed in Appeal.]

3. *Interim receipt—Conditions—Termination of risk.*—An interim fire insurance receipt stated that the plaintiff had paid a certain sum for a three months insurance, subject to the approval of the directors, and declared that the property should be held insured for thirty days from date, “unless notified to the contrary,” but that the insurance thereby made was subject to the conditions, &c., contained in and endorsed on the printed forms of policy then in use by the company. Among these was the 18th statutory condition, providing that the insurance might be terminated by the company, by giving ten days’ notice to that effect, and repaying a ratable portion of the premium for the unexpired term, and

that the policy should cease after the expiration of ten days from the receipt of such notice and re-payment. *Held*, that defendants were bound to give the ten days' notice and return a ratable proportion of the unearned premium before they could terminate the insurance under the receipt within the thirty days. *Grant v. Reliance Mutual Fire Ins. Co.*, 229.

4. *Assignment of policy—Avoidance.*—The assignee of a policy of insurance, who is not interested in the property insured, does not by such assignment and the assent of the insurers thereto become the insured under the policy, and the policy still remains liable to be defeated by a breach of the conditions by the assignor. A policy of insurance was issued by the defendants on the cash system, containing the usual conditions against subsequent insurance and alienation of the property insured, and was assigned by the insured to E. M., with the consent of the defendants. E. M. after the loss occurred assigned to the plaintiff. The assignor subsequently mortgaged the property insured, effected a further insurance upon it, and then conveyed his equity of redemption. The defendants pleaded these facts as constituting respectively defences to the policy. The plaintiff replied that they all occurred after the assignment of the policy to E. M. and the defendants' assent thereto.

Held, that, inasmuch as the plaintiff was not interested in the property insured, the acts of the assignor avoided the policy.

The defendants pleaded also that by the alienation of the property insured by way of mortgage the policy was avoided under R. S. O. ch. 161, sec. 41 :

Held, that a transfer by way of mortgage came within the Act, and avoided the policy in the hands of the plaintiff as assignee.

The defendants pleaded, on equitable grounds, that the policy had been assigned to E. M. by way of collateral security to a mortgage on the insured property made to him by R. & F. ; that R. & F. subsequently assigned their equity of redemption and their interest in the property subject to the mortgage to R. & M., who became the insured under the policy, subject to the mortgage : that R. & M. subsequently effected further insurances without consent or notice to defendants, and that after the loss the mortgage to E. M. was paid by R. & M., the owners of the equity of redemption : that the policy was thereupon assigned to the plaintiff, who sued as trustee for R. & M., and that as to R. & M., and the plaintiff, who sued as their trustee, the policy had been avoided by their acts : *Held*, a good defence. *Kanady v. The Gore District Mutual Fire Ins. Co.*, 261.

5. *Further insurance — Mistake.*

—Contrary to the statutory condition in a policy issued to him by defendants, the plaintiff, who was illiterate, being told and induced to believe by the agent of the M. company that plaintiff's policy had expired, effected another insurance on the same property with the M. Co., and received from the agent the usual interim receipt for thirty days, acknowledging payment of the premium, for which the plaintiff gave his note instead of money. After the fire, which happened within the thirty days, the agent, with whom plaintiff had effected the further insurance, discovering that the policy issued by the defendants had not in

fact expired, withdrew plaintiff's application for the insurance with them, and got back the interim receipt from him.

Held, that the condition was nevertheless broken, and the plaintiff could not recover: that the question whether there had been in fact any subsequent insurance at all, by reason of the premium having been, contrary to the rules of the company, paid by note instead of in money, could not be determined in this suit, particularly as the company had admitted their liability by paying an insurance effected at the same time on plaintiff's furniture, the premium on which had been covered by the same note. *Gauthier v. Waterloo Ins. Co.*, 490.

6. *Policy issued in Montreal*—*R. S. O. ch. 162, sec. 3*—[*Statutory conditions*.]—*Held*, that a policy of insurance issued by a company whose head office was in Montreal, and signed by their president there, and countersigned by the local agent in Ontario, where the property insured was situated, was within *R. S. O. ch. 162, sec. 3*.

Held, also, following *Parsons v. Citizens' Ins. Co.* and *Parsons v. Queen's Ins. Co.*, 4 App. R. 96, 103, that the conditions of the policy not being, in accordance with the statute, headed either "Statutory" or "Variations," the policy was one without conditions; and the condition as to arbitration could therefore form no defence. *McIntyre v. National Ins. Co. of Montreal*, 501.

7. *Interest of insured in vessel*—*Representation as to stove on vessel*—*Right to use for refitting*.]—One of the questions contained in an application for insurance on a steam vessel was, "State fully the applicant's

interest in the property, whether owner, mortgagee," &c., to which the answer was "Owner." It appeared that the assured, on the purchase of the vessel, arranged with the vendor that he should retain a sixteenth interest, in order that the assured might obtain the benefit of a contract made with the vendor by one P., not to put an opposition boat on the route, and sixty shares only were therefore transferred to the assured. It further appeared that the true state of the title was fully disclosed to the defendants' agent at the time of the insurance and discussed between him and assured: *Held*, that in the answer to the question there was involved no misrepresentation or non-communication of any material fact; and that in the absence of fraud or bad faith, neither of which was imputed, it was true in letter and in spirit; and that the plaintiff was therefore entitled to recover.

Another of the questions contained in the printed form, which was that used in insuring buildings, was, whether the stoves, funnels, flues, &c., employed for heating or using fire, were properly secured, to which the answer was "None." The application was filled up by the defendants' agent, and on the back was written, "No fire is used on the steamer;" while to the question, specially addressed to himself, "Are there any other circumstances connected with danger of fire to the property proposed for insurance?" his answer was, "No;" and that he confidently recommended the risk. In his evidence at the trial he stated that the plaintiff told him there was a stove on board, but that there would be no fire lighted until he was fitting up in the spring: that

he turned to his book of instructions, and when plaintiff asked him if he could light a fire then, he said certainly, and that his doing so would not affect the policy. The book of instructions provided that the risk was to include ordinary refitting in spring, and that the policy was to specify the kind of fuel to be burned: *Held*, that the word "None," written after the questions, must mean, in the words of the questions, that there were no stoves, funnels, flues, and other apparatus employed for heating or using fire, and not that there was no stove on the vessel used or unused.

Held, also, that defendants must be held liable on the explanation given by their agent to plaintiff as to his right to use the stove for refitting purposes, which the risk must therefore be considered to have included.—*Lyon v. Stadacona Ins. Co.*, 472.

8. *Conditions on face of policy—Title as owner.*—In the body of the policy, after stating that it was made subject to the conditions therein contained or thereon endorsed, that is to say, the statutory conditions, as varied by the conditions thereunder written, &c., it was added, "In case of loss payment shall be made within sixty days after the completion of the proof of loss in accordance with said conditions": *Held*, that this was a condition, and that not being headed in accordance with the statute, it could not vary the 17th statutory condition endorsed, which required payment in thirty days.

A subsequent insurance effected by a mortgagee, under a mortgage containing a covenant to insure according to the Short Forms Act, without the plaintiff's knowledge or consent, was held not to avoid the

policy under the 8th statutory condition. *Sauvey v. The Isolated Risk and Farmers' Fire Ins. Co.*, 523.

See LIFE INSURANCE, 1, 2.

INTEREST.

See RAILWAYS AND RAILWAY COMPANIES.

INTERPLEADER.

Attaching orders—Adverse claims.—In an action brought by an assignee in insolvency for a debt admitted to be due to the insolvent, defendants applied for a stay of proceedings and for an interpleader to try the rights of the assignee as against various creditors of the insolvent, who had served attaching orders and garnishing summonses prior to the insolvency: *Held*, that the defendants should have had the garnishment proceedings disposed of in the Courts in which they had been taken, instead of making this application, which was therefore refused.

The assignee having given no assistance to the Court by affidavit, and having made no attempt to adjust the claims, was refused his costs, *Picken, Assignee of Morrison v. The Victoria R. W. Co.*, 372.

JUDGMENT.

See SET-OFF.

JURISDICTION.

Recount of votes under 41 Vic. ch. 6, sec. 14, D. not within jurisdiction of Court.—See MANDAMUS, 1.

JUSTICE OF PEACE.

See NOTICE OF ACTION.

LANDLORD AND TENANT.

1. *Covenant to pay for buildings—Construction of—Assignee of chose in action—R. S. O. ch. 116. sec. 7.*—Lessor covenanted with lessee that he would at the expiration of the term pay him, his heirs or assigns, a valuation for his buildings on the land demised: *Held*, CAMERON, J., dissenting, that the covenant was neither wholly spent in the event of destruction by fire of the building then in existence, nor necessarily limited to the then value of the existing building, but that the increased value of subsequently erected buildings could be claimed, at the expiration of the term, against the landlord.

Held, also, affirming the judgment of WILSON, C. J., that the assignee of the term, and of all claims under the covenants in the lease, could, as the assignee of a chose in action, sue in his own name the executors of the covenantor, under R. S. O. ch. 116, sec. 7. *In re Thomas Haisley and Margaret Lundy and others, executrix and executors of William Lundy*, 345.

2. *Eviction by title paramount.*—Prior to the lease of the premises, for the rent of which this action was brought, the plaintiff's predecessor in title had mortgaged the same, and the assignee of the mortgage brought ejectment against defendant, the tenant of the premises, who thereupon gave up possession: *Held*, that this amounted to an eviction, and that plaintiff could only recover the rent up to the date of the writ, which must be looked upon as

the date of the eviction. *Barnes v. Bellamy*, 303.

3. *Lease—Covenant for quiet enjoyment—Ejectment by title paramount.*—Defendant having executed a lease of certain premises to plaintiff, containing the ordinary statutory covenant for quiet enjoyment, plaintiff was subsequently ejected by the assignee of mortgages thereon, created prior to the lease, and thereupon brought an action against defendant for breach of the covenant in question; but, *Held*, that he could not recover, as the assignee of the mortgages was not a person "claiming by, from, or under" defendant, but under the defendant's predecessor in title.

Held, also, that the fact that the defendant had taken the estate subject to the mortgages, and was to pay them off, did not extend her liability under the covenant. *Bellamy v. Barnes*, 315.

See LEASE—WASTE.

LATERAL SUPPORT.

Lateral support of house by adjoining soil—Implied reservation of by grantor—Unity of seisin—Easement—Prescription—Land weighted with buildings—Damages]—Plaintiff, tenant for years, sued for injury to his stock-in-trade, caused by his wall falling from defendant's excavation on an adjoining lot. The wall was over twenty years old, but there had been unity of seisin of both lots for a year, about the middle of the period. Then plaintiff's landlord sold defendant's lot in fee.

Held, that no easement had been acquired by lapse of time.

Held, also, CAMERON, J., dissenting, that there was evidence of negli-

gence in fact, causing damage, and that plaintiff could therefore recover, irrespective of any acquired easement.

Held, also, that lateral support to land in its natural state is a right of property; that right to support for buildings is an easement; and that such an easement is not within the Prescription Act.

Quere, whether, on the authorities, the landlord, when he conveyed defendant's lot, did, by implication of law, reserve the right of support to his then existing wall, and grantee thereby assented to such reservation.

Remarks on the law as to damages, where the land is weighted with buildings.

Per CAMERON, J., that the evidence did not disclose negligence, entitling plaintiff to recover. *Backus v. Smith*, 428.

[In Appeal.]

LEASE.

Authority to surrender.]—See SURRENDER.

See LANDLORD AND TENANT, 3—TROVER, 2.

LIBEL.

Privileged communication — Excess.]—Defendant wrote to R., who was M. P. for the county in which the parties resided, requesting him to have plaintiff, a postmaster, removed from office, as his "roguery" was unbearable in the locality, and stating that he (defendant) could not trust his bank-book through the post-office lest plaintiff should go to the bank and draw or keep the money: that he had sent a declaration to the

P. O. Department at Ottawa to have him removed; and demanding to know what the country would "turn to," if the government kept such men in office; and that if the people could not send their money through the post office they had better rise in rebellion at once. Defendant wound up his letter with a demand upon R., as their representative, to have the "scoundrel removed:" that he had "broken up seven or eight money letters, and used the money for his own purpose."

Held, that the Judge at the trial had rightly ruled that the occasion of writing the letter was not privileged; and that on the authority of *Fryer v. Kinnersley*, 15 C. B. N. S. 430, the violence of the language was so much in excess of the occasion as to exclude it from the rule as to privileged communications. *Graham v. Crozier*, 378.

LIFE INSURANCE.

1. *Misstatement in claim papers as to age of insured.—Burden of proof — Voluntary admissions.*]—One H. effected an insurance on his life with defendants, a life assurance company, and died. Plaintiff, his administratrix, in the proofs of death, stated the age of the deceased as being two years more than his own representation of his age in the application. Defendants pleaded misrepresentation of age by the deceased, and relied on the claim papers as proving it. At the trial, plaintiff swore that she had no ground for stating the age as she did, except that she had been misled into making it by entries in an old book, being a record of his service in the army, in the possession of the insured at the time of his death, and that deceased had said that

he was younger than the age in the record of service: *Held*, that plaintiff was not bound by the statement in the claim papers, but that she could on her own evidence explain it, and that the burden of proof was not shifted as to compel her to shew the true age of the insured to be as stated in the application, but that defendants were bound to prove the alleged misrepresentation. *Hayes v. Union Life Assurance Co.*, 360.

2. *Misrepresentation*—"Brother"—*Construction*.]—On an application for life insurance deceased, in answer to a question as to how many brothers he had, answered "three, two living," whereas it appeared that he had had also four half-brothers, of whom only one was living.

It was left to the jury to say whether the applicant in this answer was guilty of an untruth, and whether the statement was material: *Held*, that it was properly so left, and a verdict for the plaintiff was sustained.

Quære, as to the proper meaning of the word "brother." *Bridgman v. The London Life Ass. Co.*, 536.

was dispossessed by her sister, who obtained and continued in sole possession till the sale by her to the defendant in 1875, who remained in possession thereafter. A. L. R., in January, 1877, obtained conveyances to her from the brothers and sisters of the half blood, and filed a bill in Chancery claiming five-sixths of the land: *Held*, that the defendant was not entitled to tack to the possession of himself and his grantor that of A. L. R. prior to the ejectment, so as to bar the interests of the other tenants in common conveyed to the plaintiff:

Held, also, following *Dixon v. Gayfere*, 17 Beav. 421, that the defendant not having by himself and his grantor the length of possession to constitute a bar, the plaintiff coming clothed with a rightful title to five-sixths was entitled to succeed, even though the owners of four of those shares, who conveyed to him, had been out of possession for more than ten years.

Observations as to the proper practice upon transfer of a cause under sec. 34 of the Administration of Justice Act, 1873. *Ryerse v. Teeter et al.*, 8.

See DEDICATION.

LIMITATIONS, STATUTE OF

Ejectment—*R. S. O. ch. 108—Transfer of cause under sec. 34 of Administration of Justice Act (36 Vic. ch. 8. O.)—Practice*.]—A. W., a spinster, owner in fee, died in 1858, intestate, leaving two sisters of the whole blood, of whom the plaintiff was one, and a sister and three brothers of the half blood her surviving. The plaintiff A. L. R., on the death of A. W., entered and continued in sole possession till 1872, when by ejectment against her husband she

LIQUOR LICENSE.

See TAVERNS AND SHOPS

LIVERY STABLES.

License—Conviction quashed.]—Since the 31 Vic. ch. 30, sec. 33, O., as amended by 32 Vic. ch. 43, sec. 22, transferring the power of regulating and licensing livery stables, &c., in cities, to the board of commissioners of police, and the 36 Vic. ch. 48,

sec. 335 (now R. S. O. ch. 174, sec. 415), making it their duty to exercise their power, and repealing all acts inconsistent therewith, by-laws previously passed by corporations for the purpose have been rendered inoperative, and a conviction under such a by-law was therefore quashed. *Regina v. Hiscox*, 214.

MALICIOUS PROSECUTION.

Absence of reasonable and probable cause.]—A spike having been found driven in between the rails on defendants' line of railway, plaintiff was arrested on suspicion of being the guilty party. The evidence against him was that he had been seen on the day the act was supposed to have been committed lounging about the railway bridge and track early in the afternoon for two or three hours, and that his boots would make prints corresponding with the footmarks about the place. Plaintiff having been acquitted brought an action against defendants for malicious prosecution, and the jury having given him damages, the Court, considering the insufficient nature of the evidence against him, refused to interfere with the verdict. *Hagerty v. Great Western Railway Company*, 319.

MANDAMUS.

1. *Parliamentary election — Return of votes*—41 Vic. ch. 6, sec. 14, D. —*Jurisdiction.*]—The Court refused a mandamus to the Junior Judge of the County of Wellington to proceed with the recount of votes under 14 Vic. ch. 6, sec. 14, D., as being a matter not within its jurisdiction, but belonging to Parliament alone. *In re Centre Wellington Election*, 132.

2. *Appeal to Quarter Sessions—Order as to costs.*]—Under 32 & 33 Vic. ch. 31, secs. 65, 74, D., the Court of Quarter Sessions at which an appeal is heard must determine, on quashing a conviction, whether any and what costs are to be paid, and when.

Where, therefore, the only order made was, "Conviction quashed with costs."

Held, that no subsequent Session of the Court could interfere by way of amendment of the order or otherwise, and a rule for a *mandamus* to the chairman and clerk of the Sessions to issue the said order, with a provision for payment by the respondents to the appellant of the costs of the appeal forthwith after taxation, was discharged, but under the circumstances without costs. *In re Rush and the Corporation of the Village of Bobcaygeon*, 199.

3. *Criminal law — Conviction.*]—The Court refused a mandamus to the Mayor of a municipality to issue a distress warrant on a conviction made by him, under the Temperance Act of 1864, where the by-law and conviction were open to grave objections, which had been taken on the trial before him. *Regina v. Ray*, 17.

See MEDICAL PRACTITIONER.

MARKETS.

See MUNICIPAL CORPORATIONS, 3.

MASTER AND SERVANT.

1. *Common employment—Liability of employer.*]—Plaintiff, an employee of defendants, was sent by the fore-

man of the works to excavate earth from a bank below, while others were loosening from above. While so engaged a quantity of earth fell down upon him, and broke his leg. *Held*, that defendants were not liable, and a nonsuit was ordered *O'Sullivan v. Victoria Railway Company*, 128.

2. *Enticing servant to desert employment—Measure of damages.*]—Plaintiff sued defendants for enticing and procuring certain of his servants to desert his service, and the evidence at the trial established that the parties were in plaintiff's service, and were, with the exception of one of them, induced by the defendants' manager to leave: *Held*, following *Lumley v. Gye*, 28 Q. B. 216, that plaintiff was entitled to recover, and that the measure of damages was not confined to the loss of services, but that the jury were justified in giving ample compensation for all damages resulting from the wrongful act.

Plaintiff, while objecting to one of the parties going, said he did not know that he would trouble him if he did leave: *Held*, that this did not, in law, amount to a permission to leave his service. *Hewitt v. The Ontario Copper Lightning Rod Co.*, 287.

MEASURE OF DAMAGES.

See MASTER AND SERVANT, 2—TROVER, 1.

MEDICAL PRACTITIONER.

1. *Registration in England—Refusal to register here—Mandamus.*]—A medical practitioner, registered in England under the Imperial Medical

Act, is entitled, without examination, to practice in Ontario, on payment of the proper fees; and that though his registration in England has been after July, 1870; and a mandamus will therefore be granted to the proper authorities here to admit him to registration on payment of such fees. *Regina v. The College of Physicians and Surgeons of Ontario*, 564.

2 *Medical practitioner—Conviction for felony—Removal of name from register—37 Vic. ch. 30, secs. 34, 39—Mandamus to restore.*]—One C. was convicted, in 1869, of manslaughter, and sentenced to five years' imprisonment in the penitentiary. Before its expiration his sentence was remitted, and in 1874, after the full period of sentence had expired, he applied to defendants for registration, and was duly admitted and placed upon the register as a bachelor of medicine. At the time of his application for registration the secretary was not aware of his conviction, and the applicant was not asked any questions. Subsequently, in 1875, on ascertaining the fact, by direction of the defendants, and without notice to C., the secretary erased his name from the register: *Held*, 1. That C. had clearly been guilty of no false or fraudulent representations within 37 Vic. ch. 30, sec. 39, O. 2. That the case was not within section 34 of that Act, which referred to a conviction for felony of a person already registered. 3. That in any case he could not be legally removed from the register without notice and an opportunity of being heard.

Quere as to the true meaning of sec. 34, and remarks as to the hardship which it might work.

A mandamus was, therefore, granted to restore his name to the register.

Regina v. College of Physicians and Surgeons of Ontario.—In re John McConnell, 146.

See CONVICTION, 1.

MISJOINDER.

See CHURCHES.

MORTGAGE.

Absence of redemise clause in.—
See EJECTMENT.

Reformation of]—See EJECTMENT.

MUNICIPALITY.

See MUNICIPAL CORPORATIONS, 2, 4.

MUNICIPAL CORPORATIONS.

1. *Loan for ordinary expenditure—Resolution of Council—Liability.*—
Defendants, through their treasurer, borrowed from plaintiff certain moneys, giving him two promissory notes therefor, one under seal, the other not. No by-law was passed for the purpose, but the money was borrowed on the authority of a resolution of the council, which was not under seal, and was expended in the repair of certain bridges belonging to defendants. The jury found that the money was borrowed, received and used for ordinary expenditure, and that the repair of bridges was ordinary expenditure :

Held, that plaintiff was entitled to recover. *Armstrong v. The Corporation of the Township of West Garafraxa*, 515.

2. *Separation of Municipality—Arbitration as to debts—Liability for Government drainage—Application to refer back award—Defective materials—Practice.*—*Held*, that in the case of the separation of part of a township and its erection into an incorporated village, the liability to assessment in respect of Government drainage, which had been done under the Ontario Drainage Act on the application of the township, but for which the assessment had not been completed, was not a matter to be arbitrated upon between the two corporations under the Municipal Act, as being a debt of the township to which the village ought to contribute, each corporation being bound by the Ontario Drainage Act to raise the amount assessed in respect of such drainage upon the land locally situated within it.

Held, also, that on an application to set aside an award made under the Municipal Act the by-laws of the municipalities appointing the arbitrators, or copies thereof, and the appointment of the third arbitrator, should also have been filed. *In re The Arbitration between the Corporation of the Village of Point Edward and the Corporation of the Township of Sarnia*, 461.

3. *Market regulations—Power of Provincial Legislature—Definiteness of by-law.*—By the Municipal Act R. S. O. ch. 17, sec. 466, sub-sec. 6, City Councils may pass by-laws “for preventing criers and vendors of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto.”

Held, that this enactment was not *ultra vires* the Provincial Legislature, as being in restraint of trade and commerce, but that it was authorized

as a provision of municipal government.

Under this clause a City Council, by by-law, provided that no vender of small ware should practise his calling in a certain market specified, or in the public streets adjacent thereto.

Held, not defective for not specifying more particularly the "small ware" intended, that being the term used in the statute; but that it was bad for uncertainty in not specifying the streets intended. "Adjacent thereto," as used in the Act, means adjacent to public streets. *Re Harris and the Corporation of the City of Hamilton*, 641.

4. *Division of municipality—Bonus to railway.*—On the separation of the village of Norwich from the township of North Norwich, in which it was situate, an arbitration took place under the Municipal Act (36 Vic. ch. 48, secs. 9, 25, O.)

A by-law had been passed by the county granting a bonus of \$50,000 to the Port Dover and Lake Huron R. W. Co., and authorizing debentures of the county to be issued therefor, to be provided for by a rate levied upon the town of Woodstock and the township of North Norwich. This law was legalized by 37 Vic. ch. 57, sec. 26, O., which provided that the company should indemnify the township to the extent of \$10,000 against any excess above two-fifths of the said debentures, and should give a bond securing such indemnity, which bond had been given.

Held, that a liability of the township under this by-law was a debt of the township, although secured by debentures of the county, and within the power of the arbitrators to dispose of, as well as the bond.

It was awarded, as to the bond, that the village should be interested in it to the extent of \$10,009, and the township to the extent of \$8,991 for each \$10,000 thereof, and so in like proportion for any greater or less amount payable in respect thereof; and as to the money payable under the by-law, that the village should pay \$1 and the township \$8 for each \$6 thereof:

Held, that this mode of disposition was authorized and unobjectionable.

The award purported to be made "with the consent of the parties:"

Held, that such consent referred to the matter being disposed of, and not to the mode of disposition. — *Re Township of N. Norwich and Village of Norwich*, 34.

See BY-LAW—DRAINAGE—LIVERY STABLES.

NEGLIGENCE.

See LATERAL SUPPORT—MASTER AND SERVANT—PRINCIPAL AND SURETY.

NOTICE OF ACTION.

Action against J. P.—Bona fides.—*Held*, that in an action against a Justice of the Peace, where no notice of action was given, the plaintiff was entitled to have submitted to the jury the question whether the defendant acted *bond fide*, with an honest belief in his right so to act, so as to entitle him to a notice of action under R. S. O. ch. 73.

Neil v. McMillan, 25 U. C. R. 490, followed. *Allen v. McQuarrie*, 62.

PARLIAMENTARY ELECTION.

See CONVICTION, 2—MANDAMUS, 1.

PARTNERSHIP.

Right to retire—Death of co-partner—Dissolution of partnership.—Plaintiff and two others entered into partnership under articles of agreement, dated January 9, 1877, providing that on the death of any one partner the business was to be closed until stock was taken and the affairs of the firm settled, when there was to be a division of profits; and that if any partner desired to withdraw after a year from the date of the articles he should give the other two members the right of refusal of his share of the business, &c. There was a contemporaneous agreement as to what and how plaintiff was to pay for his share of his business; and then there was an instrument providing for the purchase by the other two partners of plaintiff's interest on certain conditions, with the alternative proviso, that if the plaintiff desired to withdraw from the firm he should be repaid all moneys put into the concern by him from the day of partnership up to January 1st, 1878; two months' notice of purchase or sale to be given on either side.

One of the other partners died within six months from the date of the articles, and the plaintiff more than two months before the expiration of the year gave notice of his desire to retire and get back his money:

Held, that the effect of the death in the partnership within the year was to dissolve the firm, and that

taking the three instruments together the plaintiff could only have obtained the benefit of the last agreement in case the firm continued to exist until after the close of the year; and therefore that his right of action was defeated by the dissolution, and his only remedy was an account in the ordinary way. *Hiram G. Frank v. Beswick et al, Executors of Solomon Frank, 1.*

See PROBATE.

PETITION OF RIGHT.

See CONTRACT WITH DOMINION OF CANADA.

PHYSICIAN.

See CONVICTION, 1. — MEDICAL PRACTITIONER.

PLAN.

See REGISTRY LAWS.

PLEADING.

Promissory note—Stamps.—Declaration on a pro-note. Plea, that the note was not properly stamped, and that plaintiff, the endorsee, did not pay double duty as soon as he acquired knowledge. Replication, that although the plaintiff, when he became the holder had knowledge of the facts stated in the plea, yet it was through error or mistake he became holder with such knowledge, and as soon as he discovered the error he paid the double duty: *Held*, replication bad, as not tendering any certain or intelligible issue.

The third plea alleged that the date which the note purported to bear was not the date on which it was made, but it was made and delivered to the plaintiff on a day long subsequent, and at that time had stamps affixed to the required amount, on which a false date, *i. e.*, the date named in the note, was written instead of the true date of affixing.

A similar replication to this plea was *held* good, because the plea did not in terms allege that the duty had not been paid.

Semble, that the plaintiff might have the protection of the statute under a traverse. *Boustead v. Jeffs*, 255.

See PROMISSORY NOTES, 1.—SHERIFF.

PRACTICE.

See ARBITRATION AND AWARD, 4
—BY-LAW, 2—COSTS, 1—MUNICIPAL
CORPORATIONS, 2.

PRESCRIPTION.

See DEDICATION—LATERAL SUPPORT.

PRINCIPAL AND AGENT.

See SURRENDER.

PRINCIPAL AND SURETY.

Negligent loss of security—Discharge of surety.]—Upon the evidence in this case it was held to have been rightly found at the trial that the defendant endorsed the notes sued on on the understanding and

agreement with the plaintiffs, by whom they were to be discounted, that the proceeds should be applied in the purchase of pork, on which the plaintiffs were to take and hold security for the payment of the notes; that the plaintiffs had such security on pork which was of greater value than the amount of the notes; and that the plaintiffs through their negligence lost such security, the makers either having been allowed to sell the pork and receive the proceeds, or such proceeds having been received by the plaintiffs and applied to other liabilities of the makers. *Held*, that the defendant was discharged.

As between these parties it was held unnecessary to discuss the right of the makers to give valid warehouse receipts for such pork to the plaintiffs, there being enough shewn to create a valid pledge of the pork, for the special purpose of the agreement, and to provide a fund to which the defendant looked for protection.

The alleged impracticability of the bank attending to the sale and disposition of such property in their ordinary course of business was held immaterial, there being an express agreement as above stated—*Molson's Bank v. Girdlestone et al.*, 54.

PROBATE.

Mercantile firm—Deceased partner—Probate fees under Surrogate Court Act, R. S. O., ch. 46.]—For the purpose of taking out probate and paying the fees thereon, the representative of a deceased partner in a mercantile firm must be taken to be interested in the corpus of the partnership effects to the extent of the share of the deceased, undiminished by the debts and liabilities

of the firm. *In re Surrogate Court of Wentworth and Kerr*, 207.

PROMISSORY NOTES.

1. *Corporation—Liability of endorser—Pleading.*—*Held*, that the endorser of a promissory note, purporting to be made by a corporation, is estopped from alleging that the note was *ultra vires* the makers.

Held, also, that the instrument in question in this case having been declared on as a promissory note, and not stated to have been under seal, it could not be assumed, in favour of the endorser, that it had been so executed as to deprive it of its negotiable character, but that if under seal the point should have been raised by plea. *The Merchants Bank v. The United Empire Club Co. et al.*, 468.

2. *Presentment—Alteration—Ratification—Evidence—Set-off.*—*Held*, 1. That the evidence set out warranted the jury in finding that there had been a sufficient presentment of the note in question, for that the person who, on the day when it fell due, was at the place where defendant had carried on business, and to whom it was presented, was there as representing the maker, and the place was the maker's office for the day. 2. That even if the note—given for a composition agreed upon with the creditors of an insolvent, of whom the plaintiff was one—was altered after the endorsers had signed it, by adding the words "with interest at seven per cent," there was ample evidence to shew that it was so altered while in the hands of the assignee, to conform to the original inten-

tion and agreement of the parties, and that the endorsers subsequently assented to it.

When the plaintiff proved his claim against the insolvent's estate he held, as collateral security, certain overdue notes, which he did not mention, and he afterwards received certain payments on them: *Held*, that such payments could not be allowed as a set-off in this action under R. S. O. ch. 50, sec. 142. *Fitch v. Kelly et al.* 578.

See PLEADING.

PROVINCIAL LEGISLATURE.

See MUNICIPAL CORPORATIONS, 3.

RAILWAYS AND RAILWAY COMPANIES.

Action by judgment creditor against shareholder.—N.D., one of the defendants, having a claim against a railway company for \$1,800, assigned it to one H. by an instrument absolute in form, but really in trust, to enable H. to sue, first, the railway company, and then the defendants, as shareholders of unpaid stock of the company. H. accordingly recovered judgments against both the company and the defendants, but made no effort to realize on that against the latter. After the commencement of this action, however, which was by a judgment creditor of the railway company against the defendants, as shareholders of the company, for their unpaid stock, defendants' solicitors gave a check for the \$1,800 to H., who, after retaining \$127. the amount of a claim he had against N. D., handed over

the balance to him, and the defendants then set up as a defence to the action this payment under the judgment recovered by H. against them; but, *Held*, on the facts in evidence, that the judgment so recovered against the defendants and the alleged payment thereunder, constituted no defence to the claim of an ordinary judgment creditor, and that in fact the stock of the present defendants had not been paid up to the extent of \$1,800, which was therefore liable to plaintiff's claim.

Held, also, HAGARTY, C, J., diss., that plaintiff could recover the interest on the calls made by the company for that amount of the stock. *Nasmith v. Dickey et al.*, 414.

See AGREEMENT — ARBITRATION AND AWARD, 2, 3, 4 — BY-LAW — MALICIOUS PROSECUTION—TROVER, 1—WORK AND LABOUR, 1.

RATIFICATION.

See PROMISSORY NOTES, 2.

RECTIFICATION.

Of Mortgage.—See EJECTMENT.

REFORMATION.

Of Mortgage.—See EJECTMENT.

REGISTRY LAWS.

Plan—Description of land.—M. was owner of the east half of a certain lot of land. In 1872 he employed one S. to draw a plan of a portion of the lot, upon which some

lots were lettered and others numbered. The land in question was marked on the plan as "The Parsonage," but was neither numbered nor lettered. The plan so marked was never registered. In 1874 M. mortgaged to B., one of the defendants, the said half lot, "reserving thereout lots numbered from 1 to 181, both inclusive, as shewn on a plan made by S., and dated 1872"; and during negotiations for the loan M. left a lithographed copy of the plan in B.'s possession. B. registered the mortgage, but took no steps to register the plan. Subsequently M. altered his plan by running a street through lots 106 and 115, and transferred the number 106 to the parsonage lot. The date of the plan remained as 1872, and M. then registered it in its altered state. In 1876 M. applied to the plaintiff for a loan of \$600 upon lot 106, or the parsonage lot. An abstract was obtained by the plaintiff from the registrar, from which the prior mortgage from M to B. was omitted, the registrar considering that inasmuch as lots 1 to 181, inclusive, were excepted from B.'s mortgage, the property in question was not affected by it. A mortgage was then made by M. to the plaintiff. In ejectment by the plaintiff against B. :

Held, that defendant's title must prevail—1. That no obligation was cast upon B. under the registry laws or otherwise to register the plan, which was only referred to in describing the reservations from the mortgage. 2. That B.'s title was complete by registration of his mortgage on the township lot. 3. That if from any cause the exception or reservation from the property mentioned in B.'s mortgage proved abortive or ineffectual, B. was entitled to

the excepted portion also.—*Muttlebury v. King and Buchanan*, 355.

See DEED.

RESERVATION.

See EXCEPTION.

RIGHT OF WAY.

See EXCEPTION.

SALE OF GOODS.

Action for goods bargained and sold—Period of credit not expired.]—An action for goods bargained and sold, to be paid for by instalments, cannot be maintained until the full period of credit has expired. *Moore v. Kuntz*, 309.

SESSIONS.

Must determine costs on quashing conviction.]—See MANDAMUS, 2—
TAVERNS AND SHOPS.

SET-OFF.

Setting off judgments.]—This suit was tried on the 15th of April, before a Judge, who gave his verdict for the plaintiff on the 16th of May, on which judgment was entered against defendant on the 10th of June, 1879. On the 29th of May all proceedings were stayed by order until the determination of an action, arising out of the same transaction, which had been begun in the County Court by defendant against plaintiff

on the 1st of January. This action was tried on the 8th of July, when the defendant (plaintiff therein) obtained a verdict, and on the 27th August, judgment being entered thereon, an order was made setting off the judgments.

Held, that the proceedings should not have been stayed, and the order was rescinded. *Booth v. Walton*, 497.

See PROMISSORY NOTES, 2.

SHERIFF.

Action for not arresting under attachment for disobedience—Tender by sheriff under attachment.]—*Held*, that an action lies against a sheriff for not arresting an attorney against whom an attachment has issued for not handing over, pursuant to order, all deeds, books, papers, &c., in his custody belonging to plaintiff; and that a plea which stated that on delivery of the attachment to defendant, the attorney delivered to him all deeds, &c., in his custody or power, to be by defendant delivered to plaintiff, in pursuance of the order for contempt of which the attachment issued, and that long before the return day defendant tendered them to plaintiff's attorney, who refused to accept them, and that defendant was at all times ready to deliver them to plaintiff, was bad; for that, besides being hardly an answer to one of the counts of the declaration, which was for falsely returning that the attorney could not be found, a statement that the attorney delivered to defendant all deeds, &c., in his custody, might be true as to those then in his hands, and yet not all within the scope of the order and attachment; but that plaintiff was entitled to have the

body in Court, and to get discovery of all deeds, &c. *Burnham v. Hall, Sheriff*, 297.

STAMPS.

See PLEADING.

STATUTES (CONSTRUCTION OF.)

31 Vic. ch. 30 sec. 33, O.]—*See* LIVERY STABLES.

32 Vic. ch. 43 sec. 22, O.]—*See* LIVERY STABLES.

32 & 33 Vic. ch. 31, ss. 65, 74, D.]—*See* MANDAMUS, 2.

32—33 Vic. ch. 31, sec. 73, D.]—*See* CONVICTION, 1.

34 Vic. ch. 5 sec. 25, D.]—*See* BANK SHARES.

36 Vic. ch. 8 sec. 34, O.]—*See* LIMITATIONS, STATUTE OF.

37 Vic. ch. 30 secs. 34, 39, O.]—*See* MEDICAL PRACTITIONER, 2.

40 Vic. ch. 27, D.]—*See* TAVERNS AND SHOPS.

41 Vic. ch. 6, sec. 14, D.]—*See* MANDAMUS, 1.

R. S. O. ch. 17 sec. 466, subsec. 6.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 39 sec. 31.]—*See* COSTS, 1.

R. S. O. ch. 46.]—*See* PROBATE.

R. S. O. ch. 50 sec. 142.]—*See* PROMISSORY NOTES, 2.

R. S. O. ch. 55 sec. 35, sub-sec. 2.]—*See* DOWER.

R. S. O. ch. 75.]—*See* TAVERNS AND SHOPS.

R. S. O. ch. 108 sec. 38.]—*See* DEDICATION.

R. S. O. ch. 116.]—*See* EQUITABLE ASSIGNMENT.

R. S. O. ch. 116 sec. 7.]—*See* LANDLORD AND TENANT, 1.

R. S. O. ch. 142 sec. 40.]—*See* CONVICTION, 1.

R. S. O. ch. 162 sec. 3.]—*See* INSURANCE, 6.

R. S. O. ch. 165, secs. 19, 20, subsec. 19.]—*See* ARBITRATION AND AWARD, 2, 3, 4.

R. S. O. 174, sec. 529 subsec. 8.]—*See* DRAINAGE, 2.

R. S. O. 174 sec. 162.]—*See* COSTS, 2.

R. S. O. ch. 174 secs. 535, 539, 540.]—*See* DRAINAGE, 1.

R. S. O. ch. 174 sec. 415.—*See* LIVERY STABLES.

R. S. O. ch. 181 secs. 51, 71.]—*See* TAVERNS AND SHOPS.

R. S. O. ch. 174 secs. 383, 456.]—*See* ARBITRATION AND AWARD, 5.

R. S. O. ch. 216.]—*See* CHURCHES.

STAY OF PROCEEDINGS.

See SET-OFF.

STOCK.

Subscription for.]—*See* AGREEMENT.

Sale of, under execution.]—*See* BANK SHARES.

Action by creditors against shareholder.—*See* RAILWAYS AND RAILWAY COMPANIES.

SURETY.

See PRINCIPAL AND SURETY.

SURRENDER.

Husband and wife—Surrender of lease by wife—Proof of authority.]—Plaintiff, being indebted to defendant for rent and otherwise, left the country with the intention, as he said, of going to Manitoba to look for lard. On his way he wrote the following letter to his wife: "Dear Polly—I am very sorry indeed. I suppose you think it strange I have not been home; but so many demands upon me at this time, I found I could not meet them. The first hint is, I have gone across the water to Manitoba, and went on Thursday. As regards Mr. Milligan's affairs, I wish you to do the best you can; but tell Mr. Milligan not to be afraid of me. I will see him all right * * Now if Mr. Milligan will do the thing that is square, that is all right; but I hope he will be a friend to you, and I will be the same to him." The lease under which the rent was due, was for seven years from 1st January, 1877, and the plaintiff left in October, 1878, having done no summer fallowing, as he was bound by the lease to do, and no fall ploughing, and leaving money enough at most only to pay the rent. On receipt of this letter plaintiff's wife sold his chattels to defendant at a valuation, and executed a surrender to him of the demised premises, of which defendant then resumed possession. Plaintiff returned in four or five weeks, when defendant gave him notice of the valuation and that he intended to sell the goods on a day named, and held them until then subject to plaintiff, and that the premises were open for the plaintiff for two months to enter and fulfill his lease; but the plaintiff would have nothing to do with this offer, and sued defendant in

trespass and trover, as also on the covenant in the lease for quiet enjoyment:

Held, HAGARTY, C. J., dissenting, that he could not recover, for that, coupled with the evidence, the letter to his wife clothed her with authority to part with the property, and surrender the premises to defendant.—*Wheeldon v. Milligan*, 174.

TAVERNS AND SHOPS.

Conviction for selling liquor without license—Appeal to Judge without jury in lieu of to Sessions—R. S. O. ch. 75, ch. 181, secs. 51, 71—40 Vic. ch. 27, D.]—Defendant was convicted of selling liquor without license under R. S. O., ch. 181, sec. 51, and appealed to the Sessions, which dismissed the appeal, on the ground that under sec 71 it should have been made to the County Judge in Chambers, without a jury:

Held, refusing an application for a mandamus to the Sessions to try the appeal, on the ground that sec. 71, R. S. O. ch. 181, was *ultra vires* the Ontario Legislature, that R. S. O. ch. 75, and ch. 181, sec. 71, constituted the County Judge sitting in Chambers without a jury a Court of Appeal in such cases within the meaning of 40 Vic ch. 27, D. *Regina v. Clarke*, 385.

TEMPERANCE ACT OF 1864.

See CONVICTION, 2—MANDAMUS, 3.

TIME.

For moving against award.]—*See* ARBITRATION AND AWARD, 2.

TOWNSHIP.

Debt of.]—See MUNICIPAL CORPORATIONS, 4.

TREES.

Whether tapping destroys, is question for jury.]—See WASTE.

TROVER.

1. *Railways and railway companies—Wrongful delivery of goods—Measure of damages.*]—The plaintiffs, nursery-men in Toronto, sent by the Grand Trunk R. W. Co. 14 packages of trees, addressed to their own order, to Cobden, a station on defendants' line of railway, receiving the usual shipping note issued by the Grand Trunk Company. These goods were delivered by that company to defendants in the ordinary course, and carried to Cobden. They were intended for one S. there, who had agreed to purchase them from the plaintiffs, but the plaintiffs required payment from him before delivery. Several telegrams passed between S., the station master, and the plaintiffs; and the station master, being authorized by the plaintiffs to deliver only half of the packages to S., allowed him to take all, receiving from him the entire freight from Toronto.

Held, that the defendants were liable in trover for the packages thus wrongfully delivered, and that it made no difference that the contract to carry was with the Grand Trunk Company only.

It was insisted by the plaintiffs that S. was to pay them \$1,000, including a former claim, before ob-

taining these trees, and that they had lost the same by defendants' wrongful delivery; but

Held, that upon the evidence there was no ground for giving more than the value of the trees wrongfully delivered and interest—the ordinary measure of damages.—*Leslie et al. v. Canada Central Railway Company*, 21.

2. *Lease—Proviso for determination—Option to pay for the crop or work—Construction.*]—Plaintiff leased certain premises from D., agreeing to give up possession, on receiving six months' notice, if D. sold during the term, with the right, if he had any crop in the ground, of harvesting it, or, if not, to be paid for the summer fallow. In August of the first year, before a crop was put in, D. sold to defendant, of which the plaintiff had notice, and that possession would be required on the 1st of April. Defendant refused to pay the plaintiff for the crop subsequently put in by him, and converted it to his own use:

Held, that the plaintiff was entitled to recover, in trover, from defendant the value of the crop so converted; CAMERON, J., dissenting, on the ground that the plaintiff's remedy was against the lessor, not against defendant.

Held, also, that the option to pay for the crop or for the summer fallow was to be exercised by the lessor.

Semble, per CAMERON, J., that it might be exercised at any time before harvesting. *Harrison v. Pinkney*, 509.

TRUST.

See EQUITABLE ASSIGNMENT.

WALL.

See LATERAL SUPPORT.

WAREHOUSE RECEIPTS.

Curers and packers of pork—Receipts for property wrongfully obtained—Admixture of property.]

T. & T. delivered, subject to their order, some hogs to the plaintiffs, with a request to notify G. & Co. at Windsor. T. & T. transmitted the bills of lading to the Merchants Bank at Windsor, which the bank, on receiving payment from G. & Co., but not till then, were to endorse over to G. & Co. G. & Co., with knowledge of these facts, procured the plaintiffs' station agent at Windsor, on arrival of the hogs there, to deliver up the hogs to them, but on the express agreement that until they obtained a delivery order from T. & T. they would hold the same for the plaintiffs. G. & Co., who were curers and packers of pork, drew up a document purporting to be a warehouse receipt for hogs received in store from H. & Co., to be delivered to the order of H. & Co., who had no property stored with G. & Co., and without H. & Co.'s endorsement, enclosed the same to one D., the manager of the Bank of Montreal at Windsor, together with a draft on H. & Co. for \$5,000, with a request to have the same discounted, and to return to G. & Co. currency drafts for the amount thereof, to enable them to pay through the Merchants' Bank the price of the said hogs. The draft was discounted, but instead of returning the currency drafts, the manager wrongfully, and without any authority from G. & Co., ap-

plied the proceeds in payment of a previous advance made to G. & Co., on H. & Co.'s credit. G. & Co. killed the hogs and mixed the pork and lard made therefrom with other pork and lard in their factory. Subsequently G. & Co. delivered to the defendant, who was aware of its not having been paid for, the said pork and lard, together with other pork and lard, and so mixed aforesaid as to be undistinguishable except by G. & Co. and their servants. The plaintiffs claimed the said pork and lard so made from the hogs obtained from the plaintiff, and issued writs of replevin therefor. At the time of the issue of these writs the pork continued so mixed with the other pork, and the sheriff, neither the defendant nor his servants giving him any assistance in distinguishing it, in executing the writs, unavoidably took some pork not the produce of the plaintiff's hogs, but left with defendant an equal quantity in amount and value of the plaintiff's pork.

Held, that the plaintiffs were entitled to recover: that G. & Co. obtained no right or title to the hogs, or the produce thereof, as against the plaintiffs; and the defendant, having obtained possession with full notice of the plaintiffs' claim, acquired no better title than G. & Co. had.

Held, also, that nothing passed under the alleged warehouse receipt; that G. & Co. were not warehousemen or persons entitled to give warehouse receipts; and that the receipt itself had nothing to support it, for H. & Co. had no property stored with G. & Co., and it was proved that the property for which the alleged warehouse receipt was given was held by G. & Co. on a special bailment, which precluded their giving warehouse receipts therefor; and

further, it appeared from the evidence that the warehouse receipt was received under agreement between G. & Co. & D., which D. did not fulfil, and that no property therein or in the said hogs vested in said bank.

Held, also, that neither G. & Co. nor defendant could set up G. & Co.'s wrongful mixture and confounding of the property in order to defeat the plaintiffs' right to recover.—*The Great Western Railway Company v. Hodgson*, 187.

See PRINCIPAL AND SURETY.

WASTE.

Tapping trees—Covenant not to cut down timber.—It is a question for the jury whether the tapping of trees for sugar making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes; and if so found, a covenant not to cut down timber except for the lessee's use, or for purposes of improvement on the premises, will be broken by such tapping.

The general question of waste discussed.—*Campbell v. Shields*, 449.

WAYS.

See DEDICATION—EXCEPTION.

WILL.

Construction—Estate in fee.—The testator, who died in 1832, devised as follows:—"I make and give all my property, both land, house, and all the stock, and every other article I possess or own, to my

loving wife Elizabeth, making her my executrix." *Held*, that the wife took an estate in fee. *Hicks v Snider et al.*, 486.

WORDS, MEANING OF.

"*Brother.*"—See LIFE INSURANCE, 2.

"*Adjacent thereto,*" in *R. S. O. ch. 17, sec. 466, sub-sec. 6.*—See MUNICIPAL CORPORATIONS, 3.

WORK AND LABOUR.

1. *Certificate of engineer.*—Declaration on the common counts for work done. Fourth plea, except as to part, that plaintiff's claim was for work done by plaintiff for defendant, under a covenant by plaintiff to construct and complete the grading, &c., of part of a certain railway to, &c., according to a profile thereof by the chief engineer, at certain specified prices, &c.; and that the said grading, &c., should be measured, calculated, and determined by the said engineer, whose decision should be conclusive; and that the said engineer, before this action, measured and determined said work and amount payable therefor, which the defendant paid to plaintiff.

Held, on demurrer, plea good, as shewing not a covenant to refer to arbitration, but to pay certain prices to be ascertained by the engineer, whose ascertainment was a condition precedent to plaintiff's right to recover.

Fifth plea. As to the claim for work done: that before any of the work was done, or the materials provided, plaintiff covenanted to perform

the same to the satisfaction of said engineer, and that defendant should retain ten per cent, of the value of said work, which is the plaintiff's claim herein pleaded to, and that same should not be payable until said engineer was satisfied with said work, and said engineer was not, before action, satisfied therewith; *Held*, on demurrer, plea good; for that it was not a collateral covenant that was set up, but that the engineer was to be satisfied was a condition precedent to plaintiff's right to recover.

To the fourth plea plaintiff replied: 1. That the deed was not executed by defendant, nor was there any such mutual agreement between him and defendant as bound defendant to abide by the decision of the engineer: 2. That before the decision of the engineer plaintiff withdrew all authority to determine as against him, or in any way affecting him in the matter of the said measurement. *Held*, on demurrer, bad; for as to the 1st, it was not essential that defendants should execute the deed containing the contract; and as to the 2nd, the covenant was treated by it as a mere reference to arbitration, which it was not, but a term of the contract requiring observance before a cause of action arose, and the authority to the engineer was not revocable; but, *Semble*, that, even treating the covenant as a reference to arbitration, there being no provision

in the submission itself for making the submission a rule of Court, it was irrevocable.

To the fifth plea plaintiff replied that the engineer was satisfied with the work, save that the road or ground set apart for the railway had not been in some places cleared to its full width, and for and in respect of which a deduction of a small sum, much less than the said ten per cent., was made in the final estimate of the engineer, assented to by plaintiff, and formed no part of the moneys sued for. *Held*, on demurrer, bad, as not shewing authority or power in the engineer to make any deduction from plaintiff's claim in respect of work not to his satisfaction, and admitting that portion was not to his satisfaction; and as not averring a substantial performance of the work to the satisfaction of the engineer. *Canty v. Clarke*, 222.

2. *Agreement to pay according to certificate of engineer.*—Defendants agreed with the plaintiff to pay him for work to be done by him according to the certificate of the engineer of a certain railway that the work had been fully completed, and not otherwise: *Held*, that the plaintiff was bound, in the absence of fraud or undue influence, by the certificate of the engineer, and could not dispute the same. *Canty v. Clarke et al.*, 505.



